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No. 16, Original Jurisdiction.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1925

Bill in Equity Original Jurisdiction. No. 16.

STATES OF WISCONSIN, MINNESOTA, OHIO AND PENNSYLVANIA,

Complainants,

vs.

STATE OF ILLINOIS AND THE SANITARY DISTRICT OF CHICAGO,

Defendants.

REPLY BRIEF OF ILLINOIS

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STATE OF ILLINOIS AND THE SANITARY DISTRICT OF CHICAGO,

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REPLY BRIEF OF ILLINOIS *

A multitude of new issues have been injected into this case by the various briefs filed in opposition to the motion of Illinois to dismiss the amended bill. It would unduly dissolve the logical consideration of what we believe to be the only legal issues in the case to follow these several synopses of argument. Therefore Illinois will adhere, in this brief, to the synopsis of argument found on the first page of the index in her former brief and in this reply, to which index is attached an annotated synopsis of complainants' arguments, showing the location herein of our answers thereto. Complainants' very divergent views as to the facts asserted in our former "Statement" require us to precede our legal re-argument with an "Argument on facts."

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* NOTE.—Italics appearing in quotations are ours.

ARGUMENT ON THE FACTS

I.

The national interest is and always has been imminent. It is military as well as commercial. Over a century ago Congress helped to build, and affirmatively authorized, a water level canal and diversion of waters from Lake Michigan into the Mississippi, without limitation as to location or size of canal or quantity of water to be diverted, and with an implied authority for expansion as commerce should require.

The site of the canal is an ancient portage, recognized and used from the time of the earliest discoveries in America, as the connecting link in the single continuous central waterway of continental intercourse and navigation from the mouth of the St. Lawrence and the North Atlantic to the Gulf of Mexico. It was used by the Indians from time immemorial for the light craft of huntsmen in peace and as a strategic route for the war-canoes of tribal conflict. In a state of nature, it was amply sufficient for the rude traffic of that earlier day, and, with the arrival of the Europeans, became the one great pathway from the North for the discovery, colonization and conquest of our inland empire. It is so significantly linked with political, economic and racial development on this continent that no just appraisal of the immediate moving forces and the pregnant future bearings of this controversy can omit a reference to the record and the romance of that history.

Here, in the vanguard of the first fierce impulse of France came Pere Marquette, piloted by Indian navigators and seeking to extend the spiritual, if not the temporal, empire of Rome. Here, eight years later, in 1681, in its military advance to the valley of the Mississippi, marched the intrepid expedition of LaSalle under command of the devoted Tonti. Twice the great LaSalle himself took the same path and, upon his untimely death, followed Pere Memore, Abbe Cavalier, St. Cosme and Gravier.

As trade trod on the heels of discovery and conquest, the slight craft of *coureurs de bois*, bearded traders and gaunt frontiersmen, began to take their place with those of the red navigators of this beaten way. To the precise extent that either these military expeditions or this primitive barter in gewgaws and peltries required an avenue of commerce and conquest from the French Canadian settlements to the interior, this was their natural and principal highway. The domination of controlling natural barriers and defiles over the destiny of areas and peoples do not change with the advance of science and civilization, and whether it be considered in its commercial or its military and strategic aspect, this route and this defile have profoundly influenced the destiny of peoples on this continent and will continue so to do.

In its work of previsioning and organizing empire in the Northwest Territory, Congress was not obtuse to the fundamental fact that the bearing of trade-routes, natural barriers and productive areas, are quite as essential in the erection of states and their amalgamation into a powerful and harmonious federation as is political map-making and the allocation of rights rising from any system of municipal law. In the preamble of the report on the division of that territory Congress expressly recognized this principle (Journals of Congress, Volume IV, p. 663) and, in amending the act creating the boundaries of Illinois to include a strip of land littoral of Lake Michigan and thence westward to the Mississippi, it was said (p. 1677, 32 Annuals 15th Congress) that the amendment was intended to "afford additional security to the perpetuity of the Union, inasmuch as the state would thereby be connected with (the older states complainant here) * * through the lakes. The *facility of opening a canal between Lake Michigan and the Illinois river* * * *, is acknowledged by every one who has visited the place. Giving the proposed state the port of Chicago * * *will draw*

*its attention to the opening of communication between the Illinois river and that place * *."*

In 1795 a treaty with the Northwest Indians had secured free passage by this route for the United States and, by a treaty of 1816 with the Ottawas, the lands occupied by the site had been ceded to the United States. At this time, the site of the canal consisted of two short sluggish streams, one flowing into Lake Michigan, the other into the Mississippi watershed. Between them was a marshy lake. In time of high water it sometimes discharged its overflow both ways and in high east winds the water from the lake itself sometimes backed up and flooded into the Mississippi valley. In high water the voyageurs escaped any portage at all. In low water they carried their freight for short distances. As late as 1819 an official report described a gutter between the heads of the two streams which was "at first a path worn out by the feet of those who carried things across the portage." (Report of the Secretary of War to Congress 1819).

Such was the history of the *site* of the canal in question here before any construction, and such was the early development of the considerations which have ever controlled the views and shaped the conduct of all those whose duty or fate it has been to think or act in the development of the interest, security and harmony of this nation as one political entity of continental extent, as distinguished from those whose circumstance or zeal of local loyalty may unconsciously impel them unduly to minimize the importance of these considerations and to take a different view, focused in intensity but restricted in breadth, by the lens of particular or immediate or localized concern. We pass to the history of the construction of the canal itself.

As shown in our first brief, Congress very early acted upon the purpose (as above related) of the Act of 1818. It

proceeded upon a report of the Secretary of War (1819) containing a survey, the only discussion in which *was of a water level canal* which it was thought could be excavated by finishing a "canal begun by nature" and developing that gutter which, "judging from the appearance of those (gutters) now forming *was at first worn out by the feet of those who carried things across the portage.* By an act of 1822 (3 U. S. Stat. at L. p. 659) Congress authorized the State to survey and mark a canal "connecting the Illinois river with the Southern bend of Lake Michigan" and reserved from public sale a pathway 180 feet wide for its construction. It was stated by appellant in the case of *U. S. v. Sanitary District* (which statement was therefore adopted and adverted to by this court) that the effect of this act lapsed because its conditions were not complied with by Illinois. This statement was an error, as is shown by the first brief of Illinois. (p. 59.)

The conditions were complied with, and in 1826 Illinois, through her legislature, memorialized Congress for an act authorizing the construction of a canal "uniting the waters of Lake Michigan with the Illinois river."

In 1827 Congress, in response to the Illinois Memorial of 1826, passed an act (4 U. S. Stat. at L. p. 234), authorizing Illinois to build a canal "*uniting the waters of the Illinois river with those of Lake Michigan,*" and therein donated a substantial grant of land to aid in building it.

Complainants' brief contends that only a "summit-level" and not a "water-level" canal was authorized, that no authority was given by this Act of Congress to divert water from Lake Michigan, and that such Act constitutes no authorization whatever for the present canal. Since only a water level canal (to be constructed by excavating an existing "gutter") had ever been discussed and reported upon to

Congress, since the authority was to unite the two waters, and since the Illinois river is lower in altitude than Lake Michigan, complainants' principal contention must fail. Under the words and physical facts involved no other form of canalization is conceivable.

The Act specified neither size nor description of the canal authorized, but since the preceding Act of 1822 had provided that 90 feet should be reserved on either side of the canal and *that it should be and forever remain a public highway*, it can scarcely be contended (if it could under any circumstances be contended) that the Act did not prevision and provide for expansion in proportion to the growing necessities of navigation.

The Illinois memorial requesting the Federal act of 1827 represented the proposed canal as "an important addition to the *great connecting links in the chain of internal navigation which will effectually secure the indissoluble union of this great and powerful Republic.*"

It is not irrelevant to note that statesmen in that day were closer to, and therefore perhaps more concerned with, the disrupting national effect of unbalancing differences in the economic circumstance of the several theatres of human development which they were trying to amalgamate into a nation. Even then was threatening the inevitable result of growing disproportion in such differences, of unwillingness to accommodate them, and of arbitrary insistence on so-called *"absolute"* rights of states and sovereignties and short-sighted or introspective oratory about the dignity thereof—the War Between the States.

It is equally significant to note, in recounting this early history that, by acts of Parliament in 1822 and 1824, the government of Great Britain had inhibited the right of navi-

gation in the St. Lawrence river to citizens of the United States. Recent diplomatic correspondence of Canada with our State Department was reported in the public prints of February 25, 1926, as threatening now to block the Great Lakes-St. Lawrence seaway project, unless certain concessions demanded by Canada are allowed.

The economic area littoral of the Lakes is not the only, or even the principal commercial, industrial and agricultural theatre whose prosperity depends on water outlets to the sea. The Mississippi basin equally requires such an outlet, and it should be remarked with emphasis that dependence on an outlet, the mouth and approach of which is *entirely within the sovereignty and control of another government*, is not sufficient for the security of this as a nation, either for the commerce of peace or the strategy of war. There have been naval engagements in the Great Lakes. *Congress has hitherto seen fit, by statutes, to require surveys of a water route from the Mississippi to the lakes capable of floating war craft and has consistently emphasized the importance of the canal to national defense* (See pages 12 and 15 *infra*).

Peace with Canada and Great Britain must be regarded as partaking of all the certainty of which international relations are capable, but the present peace displays no unbroken record and we *have seen*, on this continent, a terrific collision between economic and political areas bound by much closer ties than are we, as a nation, to Canada.

The Lakes-to-the-Gulf Waterway and the canal in its present size are matters of national concern quite as much under the defense clauses of the Constitution as under the commerce clause.

The striving of inland peoples for free highways of navigation to open water has been, by all odds, the most

pregnant cause of political disharmony, hatred and disastrous conflict of any of which the page of human history bears record. Now, to minimize, as a matter of primary national concern, the organic importance of the Lakes-to-the-Gulf waterway or of that critical link therein which has become the subject of this suit, ill comports with the foresight, statecraft and breadth of vision which so early and so continuously have otherwise regarded it. Now to seek to strike down all that has been done to secure and safeguard it, by means of an equity suit, rested by the complainants on such principles of municipal law and procedure, as are appropriate to a boundary controversy between small private proprietors, seems singularly incongruous with the gravity of the principles and problems which here face the nation.

II.

Congress continuously encouraged and invited Illinois to enlarge the early canal and co-operated with the State in constructing the waterway to the Mississippi, of which it was a part.

In pursuance of the Act of Congress of 1827, Illinois in 1836 enacted a statute providing for a canal "45 feet wide at the surface, 30 feet at the base and of a sufficient depth to secure a navigation of at least four feet * * *to be supplied with water from Lake Michigan* and such other sources as the canal commissioners may think proper, and to be constructed in the manner *best calculated to promote the permanent interest of the country, reserving 90 feet on each side of the canal to enlarge its capacity, whenever, in the opinion of the board of canal commissioners, the public good* shall require it * * *."

There is no contention by the defendant that the present canal is the canal originally constructed under the three statutes just cited. But we do contend, and shall demon-

strate in this brief the following propositions. The status of the federal law, at the time construction of the present canal was authorized by Illinois, *did not require specific Congressional authority* before a state could proceed with such work. The intent of Congress, consistently expressed by its statutes before and at that time, was to construct a waterway from the Lakes to the Mississippi, such as would require the canal projected by Illinois, and would be vastly benefited by it. The work by Illinois was carried out under the encouragement, if not the invitation, of the Federal Government, and in very close co-operation with the War Department. That department consistently planned and executed works ancillary to and extending the waterway of the canal in precisely the same fashion as led this court to say in the case of *Wis. vs. Duluth* (96 U. S. 379), that, as against the attack of another state, the Federal Government had adopted the work. All that was done by Illinois during the entire period of the construction and diversion was officially in the cognizance of Congress. Every act by Illinois of a kind for which Congress had required Federal permission was so permitted.

In this recital, a fact must be constantly borne in mind which seems to have been overlooked by the complainant. The foregoing recitation is not (as in the Federal case recently decided) advanced as an estoppel against regulation of this diversion by the Federal government. No such question is here involved. We are relating the official history of the canal *to demonstrate the Federal interest which complainants' bill and brief say does not exist and to refute the contention that the canal is not and never was a navigation project.* The only opinion on this subject in the Federal case was that an *imminent and direct Federal interest does exist, and that the canal is a navigation project.*

We shall not here detail all the intermediate public

history contained in our first brief relating to the period between the authorization of the original canal and construction of the present canal. The funds jointly provided by Congress and Illinois proved insufficient for a water-level canal. The wealth and commerce of the state increased. In 1861 Illinois passed a statute requiring another survey of the canal and of the Illinois and Desplaines rivers "to *secure from Lake Michigan a free, flowing, ample and never failing supply of water sufficient for the navigation of the Illinois river at all times.*" Under authority of a state statute, the canal was deepened and improved until 1871, when the original purpose of Congress was consummated by the statute, and water flowed by gravity from Lake Michigan into a water-level canal on the original plan.

In 1862, while the nation was concerned with the grave alarms of civil war, the ominous motive note of warning sounds again through this narrative, in President Lincoln's message, calling the attention of Congress to the *military and commercial* importance of enlargement. In 1866, Congress began to concern itself with the project of an international watercourse via the Mississippi, Desplaines and Illinois rivers, utilizing the canal as the last link to Lake Michigan, and diverting water from the same into the Illinois. Congress appropriated money not only for surveys (which were made in elaborate detail) for such a "*system of navigation for military, naval and commercial purposes,*" (Act of March 2, 1867; River and Harbor Act of 1888, and see pages 12 and 15 *infra*), but also (and this is most important to this case) actually *began the active physical construction and improvement of that waterway from the westward terminus of the state's work to the mouth of the Illinois river.*

The nature of these reports, acts, and constructions, between 1866 and 1889, is indicated by the following quotations from a few of such reports.

The report of a survey of the Illinois river made pursuant

to an Act of Congress June 23, 1866, contained the following:

> "The Illinois river seems to have been specially designed by nature as the line by which the waters of Lake Michigan are to be connected with those of the Mississippi. Its two tributaries, the Des Plaines and the Kankakee, * * * are separated from the lake basin by a ridge of insignificant height and width. * * * *At no remote period the waters of the lake must have been carried off by these streams.* * * * the data herein contained, together with the * * canal * * *already in operation, *demonstrate beyond a doubt that the waters of the lake may be carried into the Illinois river through a navigable channel of any required dimensions*, and at a cost which cannot be regarded as excessive when the objects to be obtained are duly considered."

A report made pursuant to the River and Harbor Act of 1875, transmitted to Congress, contained the following:

> "The improvement of the eastern portion of the Illinois and Michigan canal involves the further cutting down of the summit-level and enlarging the waterway *so as to afford an unfailing supply of water from Lake Michigan for the improved Illinois river.* * * *

> "Sometime during the year 1866, the Board of Public Works of the City of Chicago entered into a contract with the State to cut down and reduce the summit-level of the canal to the elevation of the lake. * * * This contract satisfied, the work completed, and navigation on the canal resumed July 18, 1872. * * *

> *"One of the important duties of this survey was to determine accurately the volume of water to be drawn from the lake to maintain a depth of water in the river after it should be improved."*

The Chief of Engineers report of 1880 to Congress pur-

suant to the River and Harbor Act of 1879 contained the following:

> "The question of a through line of water communication from the Mississippi to Lake Michigan, via the Illinois river, has been before Congress since an early date. *In 1822, the State of Illinois was authorized to make through the public lands of the United States a route for a navigable canal connecting the Illinois river with Lake Michigan,* and between that date and 1854 Congress had granted to the State 321,760 acres of land to assist in its construction. The canal was first opened to navigation in 1848, its cost up to that time being $6,409,509.95; since then the state has spent a great deal towards its enlargement and maintenance. In the meantime several surveys, having in view the improvement of the Illinois river, have been made, the first in 1838 * * * the next in 1866, the object of which was 'to obtain such specific and accurate information in regard to obstructions to navigation in that river as will enable you to submit estimates for its improvement, so that the largest boats navigating the Illinois and Michigan canal, and steamboats drawing four feet of water, will be enabled to pass through the river to St. Louis, during the season of extreme low water without breaking cargo."
>
> *"His report on this survey led Congress to direct a more complete survey in* 1867 (*act approved March 2*), *the object of which was to prepare plans and estimates 'for a system of navigation by way of the Illinois river, between the Mississippi and Lake Michigan, adapted to military, naval and commercial purposes.'* * * * It recommended that the Illinois river be improved by the construction of five locks and dams, creating thereby a slack water system with a navigable depth of 7 feet at the lowest stage. * * * The *State of Illinois, in substantial conformity with that plan, has constructed two of the proposed locks and dams* * * * at a cost of $747,747, while the annual appropriations by Congress for improving the Illinois river (aggregating to date $589,-

150) have been applied mainly to ameliorating its navigable condition * * * it was decided to apply the $5,000 allotted for our survey to the remainder of the river * * * *the improvement of the Illinois river, supplemented by the enlargement of the Illinois and Michigan canal as heretofore proposed, will furnish a reliable and commodious channel of water communication from the Mississippi river to the Northwestern lakes;* by this time the vast Mississippi valley, and all the country tributary thereto, is brought into direct water communication with Lake Michigan, at the great City of Chicago, with its flood of commerce eastward and westward; the route exists as a practicable one of considerable importance today, and the question is simply one of enhancing its value by increasing its capacity to a degree commensurate with the important interests involved.

"Other routes have been examined and studied with care, but neither of them occupies so central a position, can be built so soon, and with such certain results, maintained so economically, nor utilized through so great a part of the year."

A report pursuant to the River and Harbor Act of 1882, by the Chief of Engineers to Congress contains the following:

"* * * In regard to the proposed survey of the Illinois and Des Plaines rivers. * * * The necessity of the improvement derives its importance from several considerations. *The State has improved the river for ship navigation from La Salle to Copperas Creek, and the government is now engaged in continuing the improvement thence to the mouth.* I am directed to report upon the cost of enlarging the Illinois and Michigan canal * * * This work, * * * will give through navigation for large vessels from the lake to the Mississippi. * * * with the improvement of the river * * * carried on, navigation will be brought to within thirty-three miles of the lake, and this stretch can be opened by improving the Des Plaines higher up and *by enlarging the present Illinois and Michigan canal.*"

A report of Engineers of 1887, pursuant to the River and Harbor Act of 1886, contains the following:

"The project now in the course of execution for the reach of the Illinois river * * * a distance of 135 miles, contemplates the construction * * * so as to insure a continuous depth throughout of not less than 7 feet at low water. * * * *The ultimate object * * * is to provide a channelway from the lower end of Lake Michigan to the Mississippi river of sufficient capacity to accommodate large sized Mississippi river-boats, so that the products of the country may be carried from the lake to the gulf without breaking bulk; also to enable vessels of war of considerable capacity to pass freely from the Gulf of Mexico into the defenseless waters of our northern lakes, should the exigencies of our foreign relations ever require this to be done.*

"* * * It will then be practicable for the large steamers belonging to the Upper and Lower Mississippi, the Ohio, and Missouri rivers to come with their unbroken cargoes to within 100 miles of Lake Michigan. * * * by an expenditure * * * of less than $600,000.

"The Illinois river * * * has been improved by the State of Illinois *by means of two locks and dams similar to those in process of construction by the United States on the river below.* * * * Congress has now before it the engineering data showing the feasibility and cost of a water communication between the Mississippi river * * * leading into Lake Michigan sufficiently commodious for the commercial and military exigencies of the country; * * * perfectly practical routes over which the line can be constructed are known to exist. * * * *The United States and the State of Illinois have long been committed to the project of opening a water communication between the Mississippi river and the northern lakes* of capacity sufficient for the wants of commerce and for the exigencies of our national defense, should these ever arise. * * The connecting link will be formed

which will join the northern lakes with the vast network of navigable rivers whose waters flow into the Gulf of Mexico on a scale to a certain degree commensurate with the importance of the commerce. * * * Such a route * * * will serve as a wholesome regulator to the rates that would be exacted by other methods of transportation. * * * *Besides the immense commercial advantages * * * there are military and naval exigencies that might easily arise where it would figure as a prominent factor in the problem of our national defenses. From whatever point we look at the subject there is nothing local or sectional in it.* It is true that all the work to be done happens to be in the State of Illinois. The benefits to be derived belong to the nation at large. It is fortunate, too, that at this time the subject is unencumbered by any phase of a political character. *The problem of connecting Lake Michigan with the Mississippi river by a commodious waterway that could be used for commercial, military and naval purposes, has received attention from our most thoughtful statesmen from the day of Albert Gallatin to the present.*"

The River and Harbor Act of 1888 (*the year preceding the Illinois Act*) contained the following provision:

"Improving Illinois river, Illinois: Continuing improvement Two Hundred Thousand Dollars. And for the purpose of securing a continuous navigable waterway between Lake Michigan and the Mississippi river, having capacity and facilities adequate for the passage of the largest Mississippi river steamboats, and of naval vessels suitable *for defense in time of war*, the Secretary of War is authorized and directed to cause to be made the proper surveys, plans and estimates for a channel improvement and locks and dams in the beds of the Illinois and Des Plaines rivers from La Salle to Lockport, so as to provide a navigable waterway *not less than one hundred and sixty feet wide, and not less than fourteen feet deep*, and to have surveyed and located a channel from Lockport to Lake Michigan, at or near the City of Chicago, such channel to be suitable

for the purposes aforesaid; the necessary expense of such surveys, estimates, plans and location to be paid for out of the sum herein appropriated for the improvement of the Illinois river'."

The survey made and reported to Congress in 1890, pursuant to this act contained the following:

"* * * The conclusion has been arrived *at that it is necessary, for sanitary reasons, to construct a channel or channels from the lake to the Des Plaines valley, beyond the Chicago Divide, capable of carrying to the Illinois river from* 300,00 *to* 600,000 *cubic feet of water per minute,* to carry off and dilute to inoffensiveness the sewage of this great city, to prevent contamination of its water-supply *necessarily taken from Lake Michigan;* and that the necessary legislation to enable the city to undertake the work has been obtained from the State Legislature.

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"This route has invited attention as a practicable locus for a waterway between the Great Lakes and Mississippi river for many years, and its advantages have been so often reported to Congress that anything herein said would be mere repetition. It is sufficient to say that the minimum channel herein estimated upon will open a *channel of commerce with a maximum annual capacity of* 30,000,000 *tons between the Great Lakes, with its terminus at their greatest port, and a system of navigable rivers penetrating one-half of the states and territories of the Union, with a total navigable length equal to more than half the circumference of the globe.*"

III.

When the present canal was authorized by Illinois, the status of Federal law and administration were such that affirmative approval of Congress was neither required by Federal law nor believed as necessary or advisable.

The recitation to this point will give some idea of the co-operation and attitude of Federal administration at the time the present canal was undertaken by Illinois and of the attitude of Congress toward a waterway for very large ships and warcraft utilizing the canal, but, for a just appraisal of the circumstances of the critical year of 1889, it is necessary also to note the status of Federal law when Illinois passed her statute authorizing the canal.

Congress had not yet passed either of the River and Harbor Acts of 1890 or of 1899, the former of which was later described by this court as inaugurating "a new policy of direct control over the navigable waters of the United States" (*Southern Pacific Co. v. Olympian Dredging Co.* 260 U. S. 262), and the latter as an advance thereon (*Sanitary District vs. U. S.*, 266 U. S. 405). The law as then expounded by this court was that until Congress should see fit to assert general control, the power of a state to authorize obstruction in navigable capacity of waters within its borders was plenary (*Willamette Iron Bridge Co. vs. Hatch*, 125 U. S. 1 (1887), and even *after* the statute of 1890 and until the statute of 1899, it was held that a state *statute* fulfilled the requirements of the statute of 1890 and that an obstruction of a navigable stream within a state authorized by a state statute was no offense against the laws of the United States (*Lake Shore & Michigan Southern Railway Co. vs. Ohio*, 165 U. S. 365 (1897); *U. S. vs. Bellingham Bay Boom Co.*, 176 U. S. 211 (1899) Some idea of the then status of Federal law and administration on this subject may be gathered from an excerpt from a report to Congress by the Chief of Engineers (1895), written six years *after* the canal was authorized and begun:

> "The United States has always been slow to move; with its many sleeping rights, it has for many years been loath to exercise them. *Not till 1888 did it begin*

to exercise positive legislation over its navigable waters in order to preserve them for all its citizens. Each River and Harbor bill since then is found to have sections strengthening the hands of those who wish to keep the waterways open, and in good order for all classes of navigators. Not till 1890 had any prohibitive clauses been enacted into laws forbidding, for example, the destruction of channels by improper dumpings. *Saw mills went their own unchecked way every year, clogging up the streams. Railroads bridged all smaller streams in the states, without interference from the United States.* Many other features can be quoted. *But it is sufficient to say that all that is now changed. The adopted policy is to defend, as well as improve, all water courses,* now navigable or probably navigable, in the reasonably close future. Waterways are under the charge of the United States, and there is no likelihood of their being abandoned for some time to come."

"With this an established fact it is impossible to think that U. S. supervision shall not be extended to the Chicago Drainage Canal in due time. Under whatever law built, and for whatever purpose constructed, just so soon as it is shown that that canal affects, or becomes a part of the system of navigable waterways of the United States some supervision or control of *it must follow.* When boats use it for harbor purposes; when its waters add to the Illinois river, or take from the lakes, they alter natural conditions, *and the matter rises for consideration under national authority."*

The same report also discloses the fact that not before November, 1891, had any one suggested that diversion of water would affect the lakes, and that the suggestion then came from the American Society of Civil Engineers. The report continues:

"What Is the Outflow of the Lower Lakes?

"In November, 1891, the Chief of Engineers U. S.

A., at the request of the Secretary of the American Society of Civil Engineers (who had been asked by the Chief Engineer of the Montreal Harbor Commission of Canada to suggest the subject), ordered a set of observations made to *determine the amount of water flowing down the Niagara river.* The time was especially propitious, as the water was then very low.

"The results of these measurements were somewhat unexpected, and they were repeated in May, 1892. The second set corroborated the first, and the whole formed the *subject of a report to the Chief of Engineers,* which appeared in his annual report of 1893, page 4364, and following. But, as the subject was important, the 'Engineering News' anticipated the appearance of the official report by publishing in its issue of March 8, 1893, this report, with the permission of the Chief of Engineers. *This publication was the first ever made in which as a result of careful measurements a relation between the level of the lakes and their outflow, or discharge, had been established and given to the public.* Prior determination of this discharge had not attempted to detect this relation, and nothing more than a general determination of a season's work had been published.

"In all plans for the Chicago Drainage Canal the early measurements had been taken, and those studying the subject chose such isolated figures as suited them best.

"The report of 1892, being so late in appearance, long after the Drainage Canal was put under construction, escaped the notice of many who are interin navigation, for two reasons. Some were too busy to see anything, unless specially brought to their notice. *Others thought the whole matter already fully canvassed, and settled."*

In the light of the foregoing history of the events leading up to the enactment of the Illinois statute creating the canal

and of the then status of Federal policy and project, it can hardly be gainsaid that the State of Illinois was then justified in her conclusions that she had full legal authority to do all she was about to do; that a waterway, joining the Mississippi and Lake Michigan capacious enough to float the largest lake vessels and even ships of war was the fixed military and commercial policy of the United States, and was in actual process of consummation; that the construction of a canal along the general route of the old canal and capable of navigation by any facilities then existing on the lakes, or likely there to exist, would be a tremendous stride toward the consummation of that national waterway, and was not only permitted, but, considering all the enthusiasm theretofore displayed by Congress and the Federal department in charge of such works, would be gratefully welcomed by the United States.

On May 28th, 1889, the legislature of Illinois passed a joint resolution addressed to Congress. *It declared the policy of Illinois to be* "to procure the construction of a waterway *of the greatest practicable depth and usefulness from Lake Michigan via the Des Plaines and Illinois rivers to the Mississippi river.*" (Compare River and Harbor Act of the preceding year (1888) page 15 *supra*) "* * * A continuous navigable waterway between Lake Michigan and the Mississippi river * * * adequate for the passage of the largest Mississippi river steamboats and of naval vessels suitable for defense * * * 160 feet wide and not less than 14 feet deep." (Note that the Illinois statute provided for a canal 160 feet wide and not less than 14 feet deep.) The legislature memorialized the government with a formal request to stop work on the projects it was then executing in connection with the old canal, and to concentrate all funds on the extension of the new and proposed canal from its projected western terminal to the Mississippi, contemplating a

channel 14 feet deep and *"designed in such manner as to permit future development to a greater capacity."*

Such were the enthusiasm, the motives and the attitude of the state and the nation on the next day, May 29, 1889, when the Illinois legislature passed the act under which was created the Sanitary and Ship canal, the abatement of which has now become the object of this suit. The engineering work authorized has involved an expenditure of over $100,000,000, and the increasing demands of the city now project a further expenditure on sewage disposal works of at least $125,000,000—a burden, using the basis of a computation once made by a War Department Engineer, which on the same *per capita* basis applied to the United States would build twenty or more Panama Canals.

IV.

The canal was conceived as and is a navigation project, both in its auxiliary and direct capacity for the flotation of commerce, and also in its sanitary capacity.

To all of the foregoing history, complainants listen impatiently and reply shortly:

"The canal was never a navigation project. Its only purpose was and is, *cheap sewage.*"

In order to meet this issue squarely, we have disassociated from the foregoing history the development of the sewage disposal problem at Chicago, and its bearing on the case, believing that the record of the development of the navigation project as related above is, of itself, an overwhelming refutation of the charge.

Considering the developed cost of the sewage project to completion, the total expenditure will be in the neighborhood of a *quarter of a billion dollars.* If any large city has

a more expensive system, we are not aware of it. The sewage is not "cheap."

The history of the navigation project, as recited, would undoubtedly leave, in the mind of any careful observer, the question of why Illinois was willing to proceed at such staggering expense so far ahead of the actual completion of the large federal projects upon which she relied.

The answer is simply that she had no alternative. Her physical surroundings and the unparalleled rapidity of development of the inland empire of which she is necessarily the metropolis, confronted her as early as 1856 with a problem of sewage disposal, with which, after continuously expending her utmost energy, and treasure, without stint, she has to this day been no more than barely able to cope.

The city lies on a low, almost level, stretch of lake shore. The lake is without current, due to grade. The surrounding soil is ill-adapted to sand filtration or other methods of sewage disposal not requiring large quantities of water for dilution. Indeed, it is fair to say that no such method is even now reasonably practicable at Chicago. In a state of nature, the Chicago river, a short, slow, sluggish stream, flowed into the lake. About ten miles back of the lake, and parallel with it, the Des Plaines river flows southerly into the Mississippi watershed. The land between these streams was so low and marshy that, as before explained, water from an intermediate lake flowed, at high water, into both streams. Flood water from the Des Plaines, discharging across the gap, early became a menace to the city.

In 1856, with a population of 80,000, the first sewage system was constructed, discharging into the Chicago river. The city's only practicable water supply was the lake. The sewage deposited in the sluggish river began to fill it up. In times of heavy flood this filth was washed out into the lake and contaminated the water supply.

Chicago began to pump water out of the river into the canal. The expedient was not sufficient. The city grew with phenomenal rapidity. The Chicago river became a reeking and pestilential offense in the heart of this great nerve center of the commerce and industry of the middle west. Its discharges into the lake threatened to deprive the city of any potable water and created an alarming situation in public sanitation. Lake currents were insufficient to transport and dilute the filthy sediment that was rapidly filling up the lake front, as well as the river, and *imminently threatening to render the harbor of Chicago, the lake itself, the enormous commercial and transportation facilities of the city, and the highway of navigation to the gulf, all unavailable for interstate commerce and navigation.*

Such was the situation addressed by the Illinois legislature in the year 1889, when it authorized the present Sanitary and Ship canal.

The only practicable solution of the sanitary situation at Chicago, presented to the legislature by the best expert advice available in the world, was the one adopted. At that time no great city had evolved any successful system of sewage disposal except the dilution system. Disposal on land was reported as impracticable. Disposal in the lake promised no alleviation. The legislature did what it had to do. It authorized the canal.

The new canal was commenced in 1893 and was completed in 1900, closely paralleling and, for a considerable distance, on the identical route of the earlier canal. Annually Congress was informed of every step of its development in reports of the Chief of Engineers, of which the following are characteristic excerpts.

The Chief of Engineers report to Congress of 1892 contained the following:

"* * * A large discharge into the Illinois river * * * which * * * would make an open river improvement practicable * * *.

"* * * The extension of the navigation existing on the western rivers to the Great Lakes * * * the advisability and conditions of joint use by the United States for navigation and the City of Chicago for drainage of the channel that must be cut for both purposes * * * can be now examined."

A report transmitted by the Chief of Engineers to Congress in 1893 contained the following:

"* * * The navigable channel of Chicago river is now maintained by the City of Chicago. * * * Chicago river is the most important navigable stream of its length on the globe. In the number of arrivals and departures of vessels annually it leads all harbors of the United States, in tonnage it is second only to New York. In these elements it is the head of the great commerce of the lakes, but in capacity, depth and width of navigation it is but a third-class port. Improvements are in progress along the chain of Great Lakes contemplating 20 to 21 feet depth of water at low water. Several harbors have 18 feet or more depth of channel. Chicago harbor has 16 feet at entrance to the river * * *.

*"It will soon be necessary for Congress to provide for the extension to Lake Michigan of the navigation established on the Illinois river * * * and to determine to what extent * * * it will utilize for navigation the great channel now being cut by local authorities in the rock divide separating Lake Michigan from the Mississippi valley."*

In 1895 the special report of the Board of Engineers on the effect of the opening of the Sanitary District channel, parts of which have been excerpted above, also contains the following:

"* * * It is true that the law as it stands, and the intention of the Trustees, contemplates the abstraction of only 300,000 cubic feet under present conditions, but after the canal is opened measurements would not be so instructive, and we *must assume that ultimately the entire* 600,000 *cubic feet per minute will be drawn from Lake Michigan, as required by the State law.*

"The abstraction of 10,000 cubic feet of water per second from Lake Michigan will lower the levels of all the lakes of the system, except Lake Superior, and reduce the navigable capacities of all harbors and shallows throughout the system *to an extent that may be determined, if at all, by actual measurements only.* Under the laws of the United States these changes in capacity cannot be made without Federal authority, and to enable the executive officers of the Unted States to act advisedly in the matter it is necessary, in the opinion of the Board, not only that these measurements be taken, *but that the money cost of restoring the navigable depths in channels and harbors be carefully estimated.*"

The Rivers and Harbor Act of 1910 provided for this survey of compensating works. A special Board of Engineers reported to Congress pursuant thereto in 1913: "To restore the diminished levels of the lakes by constructing contractive works in their outlets does not, however, present any serious difficulties."

In 1899, in connection with the application of Illinois to open the drainage canal, the local army engineers reported to the Chief of Engineers in part as follows:

"All the changes made by the Sanitary District of Chicago, taken by themselves, have been such as to increase the navigable capacity of Chicago river. * * * *I believe their channel will be entirely under control, and that if the discharge be injurious it can be at once and at any time shut off, and it is evident that the War*

Department should preserve the right to control the current and discharge through the controlling works of this channel."

In 1900 the local engineers reported to the Chief of Engineers on the effect of the reversal of the Chicago river in part as follows:

"* * * I recommend that no restrictions be placed upon the legal requirements of flow into the Sanitary canal, unless it should be found absolutely necessary to do so.

"The Engineer Department, the City of Chicago, and the Sanitary District are of one mind as to the need of improving Chicago river, and are co-operating heartily to that end, and large sums are appropriated and expended judiciously by each for the objects in view. The interests of navigation are not only being protected, but are being advanced practically sooner than could be hoped for in the usual course."

A report on the extension of navigation from the Illinois river to Lake Michigan was made to Congress in compliance with the requirement of the River and Harbor Act of 1896, which was, in part, as follows:

"* * * *Any navigable channel, therefore, constructed in continuation of the drainage canal must connect with this canal at Lockport* and terminate at or above LaSalle, about 66 miles distant, but the lockage, after the opening of the drainage canal, will be reduced by at least the amount that the increased discharge will raise the water surface of the Illinois river at LaSalle. * * *

"The Trustees of the Chicago Sanitary District are constructing their canal with fixed bridges with 22 feet clear headroom over the canal. This is ample headroom for a commercial barge canal of the largest capacity, and the difference in cost between fixed and

draw-bridges crossing the canal between Chicago and Lake Joliet, with a reasonable allowance for difference in cost of operation, is probably sufficient to construct the canal from the present terminus of the drainage canal to Lake Joliet of from 8 to 10 feet depth, with locks suitable for the passage of the largest Mississippi river barges. * * *

"That prior to embarking in any such improvement it is advisable to secure from the State of Illinois the State works along the Illinois river and such parts of the Illinois and Michigan canal as may be utilized; also to thoroughly complete the lower Illinois river improvement, which has slowly progressed for thirty years, resulting in diversion of water traffic to rail. * * *

"The locality embraces an important commercial route between the Great Lakes and the Mississippi river system, and its utility and worthiness has long been recognized by Congress."

The River and Harbor Act of 1899 required reports from he War Department on a project to extend navigation rom the Illinois river to Lake Michigan by a channel seven eet deep and also a channel eight feet deep. The report as made by a special board convened pursuant to the tatute. Referring to the canal, the report said, in part:

"* * * * This channel opens a waterway over this part of the route which more than meets the requirements of the one called for, or of any other likely to be called for, by those interested in navigation.

"*If the route by the Chicago river and drainage canal be adopted, there remains but little more than half of the work involved in the 8-foot project of* 1890 *for the Government* now to take in hand in order to complete the improvement, since the estimated cost of this portion of the channel (about 28 miles) was nearly $14,000,000."

On November 17, 1900, the Board further reported in part as follows:

> "The Board finds the most economic route for waterways of 7 feet and 8 feet depth to be from Utica to Marseilles in the bed of the river, 11.4 miles; thence around the Marseilles rapids by canal, 7.4 miles; thence in the bed of the river to near the mouth of Kankakee river, 21.2 miles; thence by enlarging the Illinois and Michigan canal to the Joliet basin, 18.3 miles; thence by canal through Joliet basin and along the east bank of the Desplaines river, 4.5 miles, connecting with the Sanitary canal at Lockport, *and thence through the Sanitary canal and the Chicago river to Lake Michigan, thus complying with the terms of the Act of March 3rd,* 1899. * * *
>
> "* * * Estimates are based upon the assumption that the State of Illinois and the sanitary trustees of the City of Chicago will cede the necessary parts of their respective franchises free of cost to the United States, both for construction and use.
>
> *"Since the Board's report of March* 17, 1900, *the Trustees of the Sanitary District have undertaken to co-operate with the United States in deepening the south branch of Chicago river to* 21 *feet and widening it to at least* 200 *feet. * * * The fears entertained with respect to the dangers of navigating the south branch of the river under the new conditions of reversed flow have been allayed* to a great degree by the practical experience of the past season."

A report made in 1900, pursuant to the River and Harbor Act of that year, which Act called for estimates of cost for a 14-foot channel *"including proper connection at Lockport with the Sanitary and Ship canal."*

"The project for the lower Illinois river provides for locks 75 feet wide and 350 feet between miter sills, with 7 feet on the miter sills at low water. The discharge of the Chicago drainage canal should increase the navigable depth to over 8 feet, and if the project be extended to Lake Michigan by the 8-foot project on which estimates have been submitted by the Board, there will be afforded a connecting link between the Great Lakes and the rivers of the Mississippi valley, not only ample for river navigation as it now exists, but also for any improvement therein that has been authorized by Congress.

"*But it is held by not a few that the United States should take the initiative and construct a great waterway of which the Illinois valley line should be a link extending lake navigation to the interior of the country,* and that a commerce which does not now exist will then develop to such a magnitude as will more than justify the expenditures. *For such a project a depth of 14 feet or greater will be required,* and further surveys and estimates for a waterway of less depth than 14 feet cannot be considered by the terms of Section 22, under which the Board is instructed to act.

"The engineering questions presented in a project for a deep waterway to connect Lake Michigan with the Illinois river, although attended with considerable difficulty, are by no means insuperable. The proposed line would embrace, first, the Chicago river, consisting of the main river and a portion of the south branch for a distance of about 5 miles. This section is now under improvement by the United States in co-operation with the Trustees of the Sanitary District of Chicago, and will, when the many changes in bridges and tunnels have been made, and the widening and deepening of the channel completed, afford a *navigable depth of 21 feet and an available width of 200 feet.*

"*Connecting with this section the sanitary canal affords a magnificent waterway, 28 miles in length, of*

sufficient depth and width for any possible requirement of navigation.

"From the west end of this canal the waters of Lake Michigan, in a steady flow amounting to from 5,000 to 10,000 cubic feet per second, are discharged into the bed of the Des Plaines river, and are carried thence down through the Illinois to the Mississippi.

"The velocity of current along the Des Plaines river, which would have resulted from confining this discharge to a channel of 8 feet depth for barge navigation *will be sufficiently reduced in a ship canal of* 14 *feet depth or over, to make up-stream navigation feasible.* On the lower Illinois river the prevailing slope of less than 0.15 foot per mile will insure so gentle a current that the depth required can be secured simply by enlarging the existing waterway by dredging in an alluvial deposit, at a cost which will be small when compared with the work which has been done by the City of Chicago in cutting through the divide between the Lake basin and the Illinois valley water-shed * * *.

"But such a channel, to be of commercial value, should either form a through line of communication between the lakes and the Gulf of Mexico or extend to some large center of population, as St. Louis."

The River and Harbor Act of 1902 *appropriated* $200,000 *for the survey of a 14-foot waterway* from the terminus of the Sanitary District canal to St. Louis. The report of the War Department transmitted to Congress by the Chief of Engineers contains the following:

"The plan proposed is based upon the assumption that the abstraction of 10,000 *cubic feet of water per second from Lake Michigan, a quantity contemplated in the State legislation affecting the drainage canal, will eventually be permitted by competent Federal authority.*

"In this connection *the Board states that it does not*

condemn the present plan of taking 10,000 *cubic feet per second,* believing, as it does, that some such amount will be needed to protect the lives and health of the people of a great city and of a populous valley; but it invites attention to the fact that *if a much larger amount be taken it will be necessary to construct remedial works elsewhere, and that these are, or should be, of an international character.* It is led to make this remark by the attitude of the Illinois legislature and of the other principal advocates of this enterprise, which is that the 14-foot waterway is only a beginning, and that a much deeper channel ultimately should be constructed, which means that a much larger volume of water must be taken from Lake Michigan. It is the opinion of the Board that the sanitary reasons for the abstraction of water so far exceed and over-shadow the commercial reasons that the amount should be strictly limited by the sanitary necessities of the case. It is impossible to fix a limit to the future growth of Chicago. In a future not remote larger amounts of water may be needed for sanitary purposes, and channels deeper than 14 feet will then become practicable in the open alluvial portion of the Illinois river."

In the report of the International Waterways Commission,, on which the Boundary Waters Treaty was based, is the following, referring to the canal:

"It constitutes a navigable channel able to accommodate the largest vessels now navigating the Great Lakes. It extends from the Chicago river to Lockport, where it discharges into the Des Plaines river and is now being extended two miles farther to a new power house. With the six miles of the Chicago river and the two miles extension just mentioned, it provides a wide and deep channel for a distance of 36 miles from Lake Michigan. At present it has no navigable connection with the streams below, but under State legislation a connection is to be made. It creates an important water power.

"Although the primary object of the Chicago Drainage canal was the discharge of Chicago sewage, its function as a channel for navigation was kept in view from the beginning.

"The Board does not condemn the present plan of taking 10,000 cubic feet per second, believing, as it does, that some such amount will be needed to protect the lives and health of the people of a great city and of a populous valley; but it invites attention to the fact that if a much larger amount be taken it will be necessary to construct remedial works elsewhere, and that these are, or should be, of an international character. It is led to make this remark by the attitude of the Illinois legislature and of the other principal advocates of this enterprise, which is that the 14-foot waterway is only a beginning, and that a much deeper channel ultimately should be constructed, which means that a much larger volume of water must be taken from Lake Michigan. It is the opinion of the Board that the sanitary reasons for the abstraction of water so far exceed and overshadow the commercial reasons that the amount should be strictly limited by the sanitary necessities of the case. * * *"

The report to Congress of the Chief of Engineers for 1906, referring to lake levels and currents in the Chicago river, contains the following:

"Furthermore, by reason of winds and barometric effects, oscillations of six inches several times in a single day are frequent, and two to four feet within an hour are occasionally experienced. Consequently, individual exceptional levels are misleading, and the general effects of water diversions must be measured by annual average rather than by monthly or daily.

"These currents, although much complained of at the time, are not greater than are constantly encountered in many tidal rivers on the Atlantic coast, where no

complaints are made, because all boat captains and pilots are accustomed to such currents and make their arrangements accordingly.

"Summing up the above, it may be briefly stated, therefore, that 10,000 *cubic feet per second diversion of water from Lake Michigan into the drainage canal will be, probably, not unreasonably obstructive to navigation or injurious to property."*

It is clear that before, at and after the canal was authorized, it was treated by the Federal Government as an integral link in the national waterways, necessary to interstate navigation, both in its sanitary and flotation aspects.

As the work progressed, some misgivings arose as to the effect of new currents in the Chicago river. Also, when the possibility of an unforeseen effect on lake levels began to appear, the Federal Government was immediately apprehensive.

From the inception of the canal, however, the Federal reports emphasize the necessity to navigation of proper sanitation at Chicago. As experience accumulated, the Government found that most of its early misgivings were unsubstantial. In any event, it relied on its complete legal control of the situation and proceeded to handle the whole matter in the best interests of navigation and of the commerce of the nation as a whole, with due regard to the existing and future necessities of the Lakes-to-the-Gulf waterway. Consistently throughout the various reports appears the importance of the canal-cut to that waterway.

It also appears from these reports that the Federal Government has conducted its improvements in the waterway below the canal and in the Chicago river above the canal

in co-operation with the State of Illinois, with due regard for the value of the canal as a part of the waterway, and in such manner as to connect up the work of the Federal Government at both ends of the canal, with *the channel of the canal itself as a continuous highway of interstate commerce.*

So much for what the Federal Government and the State of Illinois have done with reference to the present canal and diversion.

V.

Sewage disposal, standing alone, is, in this case, a matter of imminent national concern in the fields of both interstate commerce and of national defense. The problem here is a condition and not a theory. The permits of the Secretary are not only appropriate, but necessary. The canal and diversion are integral and necessary parts of a national system of navigation and can no more be decreed away than can the Straits of Mackinac.

Complainants say that nothing that has been done by either sovereignty bears any relation to navigation. We think the history of the development of the motive to secure flotation of commerce alone sufficiently disposes of that contention, but if not, there is another consideration which annihilates it. *Sewage disposal in this manner, in this case, was itself, and still remains, a compelling requirement of interstate and international navigation.*

The City of Chicago, the lake in front of it, the canals and rivers behind it, are all among the most important of the national facilities for interstate commerce. The port of Chicago did not locate itself. As we have shown, the city and the great defile back of it making possible the potential waterway between the lakes and the gulf, were all previsioned by Congress *as facilities of interstate commerce*, and were,

by Congress, tacked on to the northern end of Illinois and brought within the domain of that state for the very purpose of bringing about precisely the result that has ensued.

The projected port stood at the southern extremity of lake navigation. It was the open maw of the furthermost reach of deep water from the Atlantic Coast into the interior. It was the southernmost extremity of an impassable natural barrier (Lake Michigan) to land highways from west to east, which barrier lay directly athwart the natural trans-continental course of lowest gradients and easiest and most direct routes for railways. It was the northeast extremity of the waterway to the Gulf. It lay on the only link between the two great continental systems of waterways. To the north and east was a great and insatiable demand for raw products; to the south and west an equally insistent necessity for the products of manufacture, and, at almost equal distances in different directions, and of easy access, lay inexhaustible resources of the constituents of steel—by-product coal, iron ore, and limestone. The natural routes for their transport converged here. West to the mountains and south to the Gulf lay an area of potential productivity unequalled on the earth's surface in extent, variety and fertility. Every human activity was beckoned and impelled to this vast theater, and the bulk of every product of export, every necessity for import, had to strain through this one opening.

There is no parallel in cartography or history of a natural defile controlling to such an extent the fundamental forces of human destiny and development. Mesopotamia, Khyber Pass, the Bosphoros, Aden, the English Channel, the mouths of the Nile, the Pillars of Hercules, the Route of Conquest at Verdun—all have dominated the great mass movements of mankind, and each has controlled a pathway on sea or land, but the mere mention of them and of their

image in their present state, after the continuous development of centuries, discloses the inadequacy of comparison.

No human foresight could possibly have pictured the effect of these forces on the development of Chicago as a control center of the national system of interstate commerce. With dazzling rapidity the steel ribbons of the great transcontinental land routes came and looped themselves about the southern arc of the lake. Water craft on both great international systems (north and south) began disgorging their cargoes on the flimsy wooden wharves of the sluggish Chicago river. Industries of a magnitude never encountered or imagined, inevitably converged at this great bulk-breaking portage to serve the flood of national traffic. The growth of the community created as the resultant of these forces is unparalleled in either rapidity or magnitude. The fundamental necessities to the existence and efficiency of that port require and have heretofore received full flexibility of *administrative* control of two sovereignties. Today they are placed before this Court, which is asked to deal with them within the cast-iron restrictions of private municipal law, and to treat with the economic solar plexus of the commercial, industrial and agricultural nerve-system of the nation, as though this were a controversy between two stubborn and litigous British free-holders over a millright in a affluent of the Humber.

Chicago exists by virtue of no euphony in the name of Illinois. It is a phenomenon resulting solely from the forces of national economics and topography, converging with unprecedented momentum on the southern extremity of Lake Michigan. Congress, to the extent described, was conscious of those forces and located the port and the canal in anticipation of them. That port and canal are problems for national consideration; and such national consideration involves the waterway of commerce south quite as much as the water-

way of commerce north. In the present relation, it involves the question of protecting the lake, the harbor, the canal and the rivers from pollution and disease. That question, in these circumstances, is before the nation as a vital and overwhelming consideration of interstate commerce and in no other aspect.

It happens to be a question of tremendous gravity at this moment, because of the size and circumstances of the community, and because of the instant situation as it now exists. The condition that confronts us is as follows.

We have here an industrial and commercial community, created by national economic forces seated athwart the controlling inland link of international *interstate commerce.* Due to the addition of the peculiar effluvia of the kinds of industry, which national necessity has located here, the community is daily creating sewage equivalent to that of an ordinary population of nearly 5,000,000 persons. It has absolutely no other method of sewage disposal than one which involves the diversion of water from an inland sea, and there is grave doubt whether any other method is possible at any cost.

Complainants contend that, under our system of government, no Congress, no Secretary of War, no Federal Court of Justice, confronted with such a situation can consider its effect on interstate commerce, or, after weighing all the circumstances, can determine that the present canal and diversion could be and ought to be continued in the interest of national defense and interstate and international commerce and navigation. The reason advanced for this remarkable view is that sewage disposal has not, in other circumstances and under other conditions, been determined to fall within the realm of such consideration. Also because, if one treats the law as a set of artificial restrictions, like the arbitrary

and dead rules of chess, which were conceived for the purposes of dexterity and amusement ten centuries ago, and not as a vital and necessary hand-maiden of human progress, one flushed with advocacy may deduce a rule that a queen may not move directly to the heart of an *impasse* but must remain useless because the geometrical delineation of her restricted paths places all of them outside of her ordered trajectory. Such a contention is unworthy of consideration.

We believe that, without looking further than the foregoing recitation of facts at public cognizance, it is clear that:

(1) The whole subject matter is disclosed as one of such imminent national interest in the fields of interstate commerce and national defense as to abate the suggestion of such an interest of state quasi-sovereignty therein as would maintain the suit of any of the states complainant.

(2) That a water-level canal and diversion of water from Lake Michigan through it were originally affirmatively authorized by Congress without other limitation on expansion other than the progressive necessities of commerce; that the present situation is an inevitable development thereof, and was created with full legal authority and under such cognizance of Congress and such supervision, permission and co-operation of the proper departments of the national government as has been prescribed by Congress; and that the canal and diversion have been effectually adopted by the United States by such supervision and co-operation in its construction and administration, at least as against the claim and right of any state in this Court.

(3) The canal and diversion have utility in interstate commerce and navigation; for flotation of commerce in the canal; for creation by the canal of practicable navigation in the entire riverway from Lockport, Illinois, to Memphis, Tennessee; for connection, by the canal-cut, between the

Lakes-to-the-Gulf Waterway and the St. Lawrence Seaway, and finally, for sanitation, by the canal, of interstate and international navigation and commerce. In any one or all of these four aspects, the acts of Congress, of the State of Illinois and of the Secretary of War must be regarded as proper, appropriate, and necessary to the security of national defense and in the interest of interstate and international commerce.

Some of the permits of the Secretary of War are set forth in the bill of complaint. The chronology of the rest is contained in our first brief. An examination of them discloses how carefully every step of construction was followed by the War Department, how every effect upon navigation was observed, and how promptly and effectively control was exercised.

Beginning in 1913, a controversy arose as to the effect of earlier permits. This controversy culminated, a little over a year ago in a vindication by this court (*Sanitary District v. the United States*, 266 U. S. 405) of the validity and effectiveness of the Secretary's control. A decree issued here restricting diversion to such amount as the Secretary should determine was necessary. All operations since that time have been in strict conformity with that decree.

The complainants contend that the diversions authorized by these permits bear no reasonable relation to navigation and set up a diversion of 1000 c. s. f. as all that, *in their opinion*, is necessary to navigation. By "navigation" they mean *present flotation* of commerce in the canal and in the Illinois and Des Plaines rivers, by a system of dams and locks. To support the conclusion that only 1000 c. s. f. is necessary, they refer to certain Engineers' reports of *one particular method* of flotation favored by that *one particular group of engineers.*

The public documents cited herein disclose the *variety of opinion* that has at various times existed in the War Department, and been under consideration by Congress, concerning the *best method* of utilizing the canal. *Three* separate *depths* and *two separate kinds of Lakes-to-the-Gulf* Waterways have been considered by the War Department, and are still under consideration by Congress. The requirements of this waterway are shown in these reports to have been variously estimated at from 10,000 to 1,000 c. s. f.

Of even more importance is the difference between "navigation in the Illinois and Des Plaines rivers" and "navigation in the *Illinois, Des Plaines and Mississippi rivers.*" The latter is the Lakes-to-the Gulf Waterway. The former is complainants' waterway postulated for the purpose of their bill. The latter requires far more water than the former. Of all the plans being considered by Congress, the complainants would force upon Congress and the country, by decree of this court, a 7-foot slack-waterway—a contrivance of dams, locks and barges, useful only in the Illinois and Des Plaines rivers.

The government has several alternatives in creating the various waterways. Decision involves weighing many expedients—less diversion into the canal and more dredging and dams in the southern rivers, or more diversion from the lakes with less construction in the southern rivers and more dredging in the lakes or construction of compensating works at their outlets. Complainants want to take all these engineering decisions to themselves. In order to provide a basis for their bill, they have selected the *one* among many plans that best suits their local needs **and are seeking to control the discretion of Congress and the executive departments of government by using the equity powers of this court to force its adoption.**

Much has been said about the assertion, technically admitted by the demurrer, that the diversion complained of lowers the levels of the lakes *six inches*. The states seek to have the *natural* levels restored to their harbors, and base their claim on the quasi-sovereign right of a state to the "natural gift" of waters within their dominion. This right they assert even as against Congress and the United States. The briefs indulge in much wild speculation about the threat of complete appropriation against them, and indulge fanciful parallels to syphoning out *all* the waters in the lakes. As pointed out in our first brief, they do not allege any actual loss or injury at all. They specify no single case of any reduced loading of any vessel at any port. In a lake-level that may fluctuate, at a particular port, *two feet* in the course of *an hour*, how could they? In one of the briefs they speak of injury already suffered by "thousands of their citizens," but in view of the facts related in the bill, it must be supposed that this assertion was developed in the heat of advocacy.

As a matter of fact, the whole assertion of lowered lake levels from this cause germinated from a technical calculation of engineers that only one versed in abstruse mathematics could follow. One could not go out with a measuring rod and determine any such result. As was said by Judge Carpenter in emitting the decree confirmed by this court in the federal case: (Unpublished report.)

> "From the standpoint of the practical mariner the testimony may not be satisfactory, * * * in fact *no lake captain testified that by reason of the lowering of Lake Michigan was navigation interfered with. I have grave doubt whether any boat has been stranded or delayed by reason of the action of the Sanitary District.*"

We must concede, for these purposes, that the lakes are lowered six inches. But if the whole system of Lake naviga-

tion is an artificial creation of the War Department, the Secretary of War could regulate it with more freedom than if it were a natural system. In our first brief we demonstrated by public records that the *natural* levels of the lakes provided, at the ports and critical points averred as *locii* of injury, only insignificant depths of from two or three feet upward, but rarely more than ten feet. We showed that Congress under the same general scheme of harbor and lake improvement as was described in *Wisconsin vs. Duluth*, 96 U. S. 379, had entered every one of these ports and, by dredging to an approximate depth of 19 to 20 feet, had made them practicable for navigation. **On the face of the bill it appears that it is this artificial depth, created by the Federal government, which alone has rendered it possible for these ports to receive the freighters of "enormous carrying capacity," in respect of whose "reduced loading" the injury is claimed.**

What "great gift of nature" have we here? What *quasi sovereign* right have these states complainant in this navigable capacity of interstate navigable waters, which was created by, and (under the established doctrines of this court) belongs to, the sovereignty of the United States? What injury can there be if under color of authority of the United States 1/36th or 1/40th of the gift of *navigable capacity* received from that hand be retaken by the same hand? How, in such a state of affairs, can complainants apprehend any real obstruction by the Federal government of that which it has been at so much pains to provide? The apprehension is not real. *There are many ways of solving the problem and it is for Congress and not these complainants to select the method.*

Complainants say the permits of the Secretary of War and all that has been done under them were invalid because they were inappropriate to the needs of navigation. How

can the complainants judge the problems, the intention and the policy of the Federal government? We have shown abundantly that what has been done was done *in the interests of commerce*, both on the lakes and elsewhere. Here the Secretary of War is balancing the requirements of two of the great demands that the regulation of commerce places upon him. The Federal government has more ways than one of solving its problems. In official reports to Congress the War Department has already suggested the complete restoration of all lake levels from the effects of this and all other diversion by the construction of compensating works in several of the lake outlets. The proposed plan which would cost only a fraction of the staggering loss that would be imposed by the relief prayed for here and with a far more beneficial effect upon navigation. Restoration of lake levels would abolish the whole ground of complaint stated in the bill. But complainants will not hear to it. Why?

The only conceivable objection that these complainants could possibly have to this solution would be inadvisable for them to insert in the bill—less hydro-electric energy than could be secured by abating the diversion.

The State Department is even now negotiating with Canada for a solution of the whole problem. Congress has several cognate measures under consideration, and Illinois is working earnestly to provide, at tremendous cost, auxiliary works to reduce the amount of water required. The President's last message earnestly recommended the immediate improvement of the Lakes-to-the Gulf Waterway. This court has considered all the facts alleged here, and the canal is being administered under its decrees. Every department of the government, every agency concerned (except complainants) is working with knit brows toward a constructive solution. Can it be that there is any theory of law that will permit the sudden and annihilating crash of

a bludgeon of destruction into such a status of co-operation and efforts? We think not.

But all of the foregoing assumes that the only consideration the Secretary of War can entertain is the consideration of the flotation of ships. We have abundantly shown the fallacy of this. The plan which the complainants are attempting to force upon the government is wholly impracticable, since it cannot be consummated without the creation of a pestilential obstruction to interstate commerce and navigation at one of its most critical points.

In such circumstance, to attack the act of the Secretary of War on the sole basis of an assertion that it is capricious, arbitrary and inappropriate to the needs of commerce is sufficient of itself to warrant dismissal of the bill.

VI.

The Great Lakes are inland seas, and not a "watercourse." They partake of none of the characteristics of a river. Appropriation of an insignificant affluent of one of them, lying wholly within a littoral state does not constitute "abstraction of all the waters of an interstate watercourse," nor do nor can complainants show that any of the water diverted by Chicago originated in their boundaries.

In an attempt to supply many fatal deficiencies in the bill, complainants have tried in their brief to shift the theory of the bill to make it rest on the *common law* doctrine of *riparian rights*. To do so they treat the whole *cluster* of *lakes* as a *river*. The court will find the lakes described in *The Propeller Genessee Chief*, 12 How. 443. They are inland seas, filling a great mid-continental basin into which water flows from many surface and subterranean sources. Exposed in this basin and practically without current, this water is subject to many forces of abstraction—evaporation and other diversions, and a constant and growing

consumption by the populations rapidly increasing along its shores. The levels of the different lakes vary unaccountably integrally and as between each other, levels at particular points sometimes fluctuating two feet in an hour. No satisfactory result has ever been experienced in gauging these levels other than by measuring their outflow. There is no perceptible general current in Lake Michigan. The hydraulic principles involved have to do with the circumstance of a basin or sea and *not with those of a pipe or a river.* As we have seen, the Chicago river in a state of nature sometimes served as an outlet. It is true that, generally speaking, the excess over inflow from Lake Michigan proceeds at Mackinac into Lake Huron—but what may have been the influences creating the hydraulic equilibrium, called "levels," along the shores of Wisconsin, for example, is beyond the power of human ingenuity to determine. It is very unlikely (and it is entirely impossible to prove) that any water originating in Wisconsin ever flowed through the Sanitary and Ship canal. *If it did, it is difficult to follow Wisconsin's theory that she is* **a lower** *riparian owner.*

All of the analogies to the law of riparian ownership are here awry. Michigan and Wisconsin, which front on both lakes—Superior and Michigan—would have to appear as both upper and lower riparian owners. No water at all is or can be diverted from Lake Superior (and hence not from Minnesota). Minnesota and Indiana are necessarily *upper* proprietors, although, if their rights rest on the curious theory advanced by Wisconsin, they must assert themselves to be lower proprietors.

VII.

The boundary waters treaty of 1909 was intended and construed by our State Department as conserving to the United

States a diversion of 10,000 c. s. f. at Chicago, procured by concession of a very much larger diversion of 36,000 c. s. f. to Canada for her hydro-electric power producers. The State Department is now in negotiation with Canada on the subject of diversion, of restoring lake levels, and of the St. Lawrence seaway. The effect of this suit is obviously to embarrass these negotiations in the interest of Canada and against the interest of the United States.

The International Waterways Commission report, on the basis of which the Boundary Waters Treaty was negotiated, contained the following:

> "It can hardly be doubted that the canal will eventually form a part of an improved waterway between the Great Lakes and the Mississippi river, though its full depth will probably not be required for that purpose. Congress has not adopted any scheme for this improvement, but by its direction a survey was made, and plans with estimates for a waterway 14 feet deep were submitted by a board of engineers in a report dated August 26, 1905. * * * The board assumed that the Chicago drainage canal would eventually be permitted to take 10,000 cubic feet per second from Lake Michigan, and it expressed the opinion that with the volume added to the natural low-water discharge of the Illinois river a depth of 14 feet in the open channel could be maintained; also that if a much greater depth was to be secured a much larger volume of water must be taken from Lake Michigan. * * *
>
> "In the expenditure of $40,000,000 for the drainage canal the people of Chicago, with its population of 2,000,000, incurred a burden equivalent to that due to an expenditure of $1,600,000,000 by the United States, with its population of 80,000,000—that is enough to build eight or more Panama canals. It was a very serious effort and has commanded the admiration and sympathy of all observers. * * * The plans calling for that amount have been under public discussion for some

years. Although withholding formal approval, the Federal authorities have taken no steps to prevent their execution. Congress has called for a plan and estimates for an improvement of the waterways connecting with it, the scope of which is fixed by that amount. There appears to be a tacit general agreement that Chicago needs, or will need, about 10,000 *cubic feet of water per second for sanitary purposes, and that the city should have it without further question.* * * *

"One of the reasons given in 1889 for adopting this method of disposing of Chicago sewage was that it offered the advantage of furnishing a navigable waterway from Chicago to the Mississippi river. The navigable depth or capacity of such a waterway has never been authoritatively fixed. Congress has considered a depth of 14 feet, to the extent of ordering a survey and estimates of cost for that depth, but the Illinois legislature has declared its policy to be to secure the construction of a deeper channel, not limiting its proposed capacity in terms, but defining it to be 'of the greatest practicable depth and usefulness for navigation.' * * * A fair interpretation of this language gives a proposed depth of 20 feet, that being the depth required to accommodate the most important vessels now navigating the Great Lakes. It will require a volume of water greater than 10,000 cubic feet per second originally contemplated. * * *

"Nor does it (the Commission) wish to reopen the case of the Chicago Drainage Canal as designed and built. It accepts that as a fixed fact, with its attendant diversion of 10,000 cubic feet per second through the Chicago river. * * *

"The diversion of 10,000 cubic feet of water per second at Chicago will render practicable a waterway to the Mississippi river 14 feet deep. Any greater depth must be obtained by the abstraction of more water from Lake Michigan and at the expense of the navigation interests of the Great Lakes and of the St. Lawrence valley.

"The effect upon Niagara Falls of diverting water at Chicago is of secondary importance, when considering the health of a great city and the navigation interests of the Great Lakes and of the St. Lawrence valley. * * *

"The preservation of the levels of the Great Lakes is imperative. The *interest of navigation in these waters is paramount, subject only to the right of use for domestic purposes, in which term is included necessary sanitary purposes.* * * * We recommended, among other things, 'that any treaty which may be entered into should define the uses to which international waters may be put by either country without the necessity of adjustment in each instance, and would respectfully suggest that such uses should be declared to be (a) *uses for necessary domestic and sanitary purposes;* (b) service of locks for navigation purposes; (c) the right to navigate.' * * * **(This order of preference was included in the treaty.)**

"* * *The diversion of 10,000 cubic feet per second through the Chicago river will *provide for the largest navigable waterway from Lake Michigan to the Mississippi river which has been considered by Congress.*"

The State Department's expert explained the treaty to the Senate Committee of Foreign Relations (Proceedings Foreign Relations Committee. 57-62. Congress) in part as follows:

"*The waters of Lake Michigan do not come within the definition of boundary waters,* as defined in the preliminary article of the treaty, and it will be noted that in Article I of the treaty the waters of this lake are not included among the boundary waters of the Great Lakes system, *but are covered by special provision in the second paragraph of that article.*

"The question has arisen as to the effect upon Lake Michigan of the provisions of Article II, which deals

with tributary waters, or rather with all waters which in their natural channels flow across the boundary or into boundary waters, and the objection is made that if the provisions of this article apply to Lake Michigan, the right to recover damages for injuries resulting on the other side of the line on account of the diversion of tributary waters might interfere with the diversion of the waters of Lake Michigan for the purposes of the Chicago canal.

"In response to this objection, *attention is called to the express provision in this Article that it shall not apply to cases already existing, which would seem to cover, and was certainly intended to cover, the canal system at Chicago.*

* * * * * * * * *

"The treaty, therefore, recognizes that the settlement of the question of the use of waters of Lake Michigan is purely a domestic question, and leaves undisputed the governmental rights of the United States with respect to it."

There is doubtless a reason why Congress does not desire to enact a statute on this subject at this time. It is well known that the State Department is in negotiation with Canada at this moment and that the very subject of discussion is the regulation of the waters of the Great Lakes and compensation of the effects on lake levels of diversion by both governments; that (as shown elsewhere herein) our government believed that the present diversion at Chicago was secured by the Boundary Waters Treaty in return for a concession of a much larger diversion **for the benefit of Canadian water-power interests**; that there is involved in this negotiation the subject of the St. Lawrence Seaway, which is a corollary project with the Lakes-to-the-Gulf Waterway; that our nation is primarily interested in the latter and correlatively interested in the former, and that just the reverse is true of Canada; **that such an injunction**

as is here contended for would cut the ground from under the feet of our State Department in their negotiation and vastly increase the advantage of Canada therein; while legislation at this time would constitute an undignified, not to say fatuous, proceeding. It certainly cannot be seriously urged that a jurisdiction necessarily so sounding in the political aspect of the power to regulate commerce can be deduced in this court.

The Secretary of State, in his explanation (Proceedings Foreign Relations Committee, 57-62, Congress, pp. 271-2) of this same point, said:

> "The great bulk of the water goes on the Canadian side, and the Waterways Commission that was appointed some time ago to deal with the question of the lake levels reports, I think, that 36,000 feet can be taken out on the Canadian side and 18,500 feet on the American side without injury to the Falls. I thought it wise to follow the report of the Commission, and put in 1,500 feet in addition, to get round numbers, **so our limit is higher than we want, but their limit would not be cut down below, that is because there are three companies on the Canadian side who have works there.** Then there is this further fact why we could not object to this 36,000 cubic feet on the Canadian side: *We are now taking* 10,000 *cubic feet per second out of Lake Michigan at Chicago, and I refused to permit them to say anything in the treaty about it. I would not permit them to say anything about Lake Michigan. I would not have anything in the treaty about it, and under the circumstances, I thought it better not to kick about this* 36,000. *They consented to leave out of this treaty any reference to the Drainage canal,* **and we are now taking 10,000 cubic feet per second for the Drainage canal, which really comes out of this lake system."**

Upon such a record and on the clear intendment of the treaty itself as explained in our first brief, complainant takes

up the cudgels for Canada, and even accuses Illinois of bad faith in asserting our conclusion as to the true meaning and effect of the treaty. We did not assert that a restriction of diversion would affect the levels of the lakes *contrary to the treaty.* We said (p. 35) that the existence of such a treaty was inconsistent with the theory of a residual right of a state to maintain the bill, and inconsistent with the relief sought thereby. *In view of the character of the negotiations now going on and the claims asserted by Canada, our comment seems singularly justified, because the effect of the bill and relief sought could not be otherwise than to embarrass our government and advantage our neighbor.*

VIII.

The conclusion that Canadian and other power interests can generate more hydro-electric energy if the diversion is thrown to her than can Illinois if the diversion is continued, is based on an error in computing the diversion, is irrelevant, and serves no other purpose in this suit than to disclose its probable motive and the real gravamen of the bill.

According to complainants computation (p. 79 of their brief), we are now taking 9,700 c. s. f. from the lake (8,500 feet by our permit and 1,200 feet by pumps) plus 1,800 feet from the two rivers formerly flowing into the lake, or a total of 11,500 c. s. f. This computation proceeds from ignorance of the facts. The diversion is *measured at Lockport, Illinois* the point of outflow from the canal, and not at the mouth of the Chicago river and the various other intakes. The permit is being strictly compiled with.

To the extent that she has authority to divert, the fact that Illinois may mitigate waste by using the water diverted for the generation of hydro-electric power, has no bearing on this controversy. The history recited shows that the generation of power was an after-thought, and had and has

no effect to motivate the diversion. The "power-desires" erroneously deduced by complainants in Illinois may have been suggested by some motive which the human inhibitions, usual in such cases, have eliminated from the averments of the bill.

On page 22, and especially at the bottom of page 110, of complainants' brief appear assertions that contain the shocking implication that the states complainant are more interested in the adverse claims of Canada in these waters than they are in the rights of their sister states. The suit is in no just sense a controversy between states at all. Some organizing and provocative influence is apparent in the brief (pp. 129-142) by its reference to the procurement from five state legislatures within the space of two weeks in January and February, 1925, of resolutions protesting "Chicago's diversion." The growing insistence in the briefs on the greater quantity of hydro-electric energy that *could be created in Canada* if Chicago were denied any diversion and the water were allowed to flow into the St. Lawrence, indicates the motivating incentive and also the degree of substance of the assertions of right in navigable capacity of these waters.

ARGUMENT ON THE LAW

The bill makes no case justiciable here because the relief prayed for is not within the jurisdiction of the court, because all indispensable parties are not before the court, and because the bill well avers neither juridical right nor any injury.

I.

The bill makes no case justiciable here.

Complainants think a controversy between states is justiciable here if, as between independent sovereigns, it would be settled by diplomacy and, that failing, by force. This

pronouncement is an inclusive description and not a law of jurisdiction. The latter is defined by the Constitution. The judicial power extends to "cases in Law and Equity" and to "controversies between two or more states." (Article III, Section 2, Constitution). It is by no means unlimited, and this court has repeatedly found bars to its extension. Among them are the following:

To have a standing here a case must be presented in form and substance appropriate to judicial cognizance and "subject to judicial solution" (*Kansas vs. Colo.*, 206 U. S. 46, 117; *Louisiana vs. Texas*, 176 U. S. 1; *Massachusetts vs. Mellon*, 262 U. S. 447).

> "Jurisdiction to grant an injunction to restrain a party from a wrong or injury to the rights of another, where the danger, actual or threatened, is irreparable or the remedy at law inadequate * * * comes under a familiar head of equity jurisdiction * * *. But according to the course of proceeding under the head of equity * * * a case must be presented appropriate for the exercise of judicial power; the rights in danger must be rights of persons or property * * *" (*Stanton v. Georgia*, 6 Wallace, 50, 76).

> "The question (of jurisdiction) is therefore not finally settled by the fact that the state * * * is a party * * *. It must also appear that the case is one to which * * * the judicial power of the United States extends * * * to all cases in *law and equity* * *" (*Minnesota vs. Hitchcock*, 185 U. S. 373, 383).

> "The grant * * * was not intended to confer upon the courts of the United States jurisdiction of a suit or prosecution by the one state, of such a nature that it could not, on the *settled principles of public and international law be entertained by the judiciary of the other state at all.* * * The position that the jurisdiction conferred by the Constitution upon this court in cases where a state is a party is limited to controversies of a civil nature does not depend upon mere inference

> * * * but has express legislative and judicial sanction * * * (citing Judiciary Act of 1789; *Chrisholm vs. Georgia*, 2 Dall. 419; *Ames vs. Kansas*, 111 U. S. 449) * * *" (*Wisconsin vs. Pelican Insurance Co.*, 127 U. S. 265, 289, 297).

Where the case appears to be one in which a court of equity will refuse its aid, the defendants should be permitted to resist it by demurrer (*Maxwell v. Kennedy*, 8 How. 210, 222).

While a state undoubtedly has rights, arising from her character as a sovereign, which are *different* from the rights of an individual, and, while this difference brings cases here of a nature "unknown to the common law," these rights can create a justiciable controversy only when they appear in the familiar and traditional setting of an equity suit. There must always appear the following familiar essentials: (1) jurisdiction in the court to hear the suit and grant the relief; (2) a juridical right of the complainant; (3) a wrongful act of the defendant, threatening or invading that right. (*Georgia v. Stanton*, 6 Wallace 50, 75; *Mass. v. Mellon*, 262 U. S. 447). The mere fact that a state describes itself as a party and asserts a right does not enlarge the judicial power. (*Minn. vs. Hitchcock*, 185 U. S. 373, 383; *Oklahoma v. A. T. & S. F. Ry.* 220 U. S. 277; *Wisconsin v. Pelican Ins. Co.* 127 U. S. 265). The right asserted by a state must be a right of persons or property, or a right of dominion over physical domain, or quasi-sovereign rights actually invaded or threatened. (*Mass. v. Mellon*, 262 U. S. 447). The right must be the right of the state suing and not that of some other juridical party. Thus, where a suit is brought to protect a right under the Commerce Clause, the complainant must show that the act complained of injures him (and not another) ***in some right guaranteed to him by that clause.***

(*M. K. & T. R. R. v. Cade*, 233 U. S. 642, 648 and all seven of the cases there cited).

For a far stronger reason, a state of this Union can not derive its right to sue another state from the right of its citizens to sue in general, for the Constitutional reason that such a suit against another state by its citizens is explicitly forbidden by the Eleventh Amendment. (*New Hampshire and N. Y. v. Louisiana*, 108 U. S. 76; *Wisconsin v. Pelican Insurance Co.*, 127 U. S. 265, 286; *Louisiana v. Texas*, 176 U. S. 1, 16).

The words "*parens patriae*" can no more magic away this Constitutional inhibition than can the word "*abracadabra.*" The principle neither is, nor constitionally can be, impaired by the very usual and self-serving averment that such rights of "very many" of such citizens are involved, because the constitutional inhibition would still forbid the suit. In the cases where this circumstance has been alluded to, the court *found its jurisdiction* in a right of the state to dominion over domain, and not in the rights of citizens. It referred to the number of citizens involved as establishing the substance and clearness of the injury and not as supplying, by multiplicity of citizens, a vacuum in sovereign right of the state (*Missouri v. Illinois*, 180 U. S. 208, 241; *Kansas vs. Colorado*, 185 U. S. 125, 144, 146).

For another Constitutional reason, the suit of a state cannot import into the judicial power matters allocated by the Constiution to either of the other two great branches of the Federal government. (*Georgia v. Stanton*, 6 Wall 50, 75; *New Orleans v. Payne*, 147 U. S. 261, on 266; *So. Pac. Co. v. Olympian Dredging Co.*, 260 U. S. 205; *Monongahela Bridge Co. v. U. S.* 216 U. S. 177; *U. S. v. California Land Co.*, 148 U. S. 31, 43, and cases there cited; *Passaic*

Bridge Cases, 3 Wall., Appendix 782; *Cherokee Nation v. Georgia*, 5 Pet. 1, 29-30; *Mass. vs. Mellon*, 262 U. S. 447).

Nor will the court attempt to exercise an authority inappropriate to the judicial function. (*Texas Ry. Co. v. Marshall*, 136 U. S. 393, 406; *Marble Co. v. Ripley*, 10 Wall. 339, 358; *Giles v. Harris*, 189 U. S. 475).

Nor will the court proceed in the absence of necessary parties (*California v. Southern Pacific Co.*, 157 U. S. 229; *Minnesota v. Northern Securities Co.*, 184 U. S. 199).

This is a motion to dismiss analogous to a demurrer. This defendant contends, and in this brief will attempt to show, that the bill has all of the infirmities just discussed, and should be dismissed *as presenting a case not justiciable in the original jurisdiction of this court.*

II.

The bill asks the court to regulate navigation, a constitutional function of Congress and not of this court.

The ordinary diversion or obstruction controversy involves the simple set of circumstances that something is being done which is unlawful and the effect of which is to obstruct navigation and not to improve and secure it. A court of justice, in acting upon it, is required to *vindicate* a regulation of commerce, not to *make* one. It is required to say that an existing rule or regulation is unlawful, not to make a new rule or regulation. The former is a *judicial*, the latter is a *legislative*, function.

> "This power of regulation (fixing rates of speed on a railroad) * * * is a power legislative in character * * * the legislature may delegate to an administrative body the execution in detail of the legislative power of regulation * * *. The courts have no right to intrude upon this function * * *. In our opinion the injunction which

was issued in this case constituted, in substance, the operation of a railway * * * was, in the first place, not within the limits of judicial power, and in the second place totally inconsistent with the power of regulation vested unmistakably by the legislature in the executive authorities." (*Honolulu Co. v. Hawaii*, 211 U. S. 282, 291-293; see also *Plymouth Coal Co. v. Pa.*, 232 U. S. 531, on 543.)

"It is one thing to inquire whether rates which have been charged and collected are reasonable—that is a judicial act; but an entirely different thing to prescribe rates which shall be charged in the future—that is a legislative act." (*I. C. C. v. Cincinnati, etc. Ry.*, 167 U. S. 479, 499; *C. M. etc. Ry. v. Minnesota*, 134 U. S. 418, 458; *Reagan v. Farmers Loan and Trust Co.*, 154 U. S. 362, 397).

The case before us is of tremendous gravity and, as the facts and number and character of the parties demonstrate, is of *imminent national concern*. The problem can be completely solved in a number of ways—controlling works at lake outlets—compositions with Canada—decreased diversion and increased dredging in the southern rivers—continued diversion and increased dredging in the harbors—combinations of all methods. Any of these solutions would be infinitely more beneficial to commerce than the arbitrary relief sought here. None of them is within the power of the court. The problem requires positive and constructive measures. The power invoked must of necessity be wholly negative and, in these circumstances, tremendously destructive. Complainants seek to invoke that power to coerce the legislative and executive departments to a particular plan of their own choosing.

If it be said that the power of the Secretary is not sufficient to regulate this diversion, the case and decree of *Sanitary District vs. U. S.* is our answer. *Regulation by* this court—not *power in* this court—is invoked by this bill.

We are here considering permits of the Secretary of War —not obstructing commerce—but balancing convenience among many plans to secure and advance commerce. Commerce stands on all sides of this controversy. In the name, but not in the interest, of the common right of the whole nation, complainants demand an absolute and localized benefit to a state.

Even if the Federal government decided to abate this diversion completely, and should determine that it was humanly possible to do so, as the Federal court below in the government suit remarked, it would require many years and a complex course of administration to accomplish it.

The whole system of lake navigation as it now exists—rivers, canals, harbors, and communicating straits—is an artificial creation by Congress, that never existed in any practical sense until Congress constructed it. The complaint made here is that the Federal government is not turning sufficient water into some of the harbors thus artificially created, and is not operating its artificial system to the satisfaction of some states. What is sought is regulation of this system by the court and, as an initial step, the creation of a great plague spot at a principal rail and navigation center of our national commercial system and an instantaneous blotting out of a highway of commerce which Congress and the nation have been developing for over a century and which now seems on the verge of final consummation.

The only case cited to entice the court into this field is *U. S. vs. Rio Grande Dam and Irrigation Company*, 174 U. S. 690. There, in arid lands, a development company sought to take *all the water* on the upper reaches of a single stream. The lower court had determined that the Federal government had no interest, because it took judicial notice

that the stream was not navigable in the state. It was navigable below. This court remanded the case with instruction to determine what amount of diversion, for *purposes wholly unrelated to navigation*, would not interfere with navigation.

The case is very different here. Here the real question is: *How may the levels of the Great Lakes be regulated to preserve navigation in two separate highways with the greatest benefit to each and the least injury to either?* As we have shown, *the only practical solution is outside judicial power.*

Another controlling distinction is that, in the cited case, the court was vindicating a federal regulation of commerce. In the instant case it is asked to abate such a federal regulation and to supplant it with the court's decree. This the court has consistently declined to do, because it has found itself unable to inject the judicial power into the legislative authority, not only on the principle that it will not interfere with the administrative determination of questions allocated to the legislative branch and by them delegated to their instrumentalities, but also for the reason that such determination and administration is not consonant with the judicial function (p. 57 *supra*). Some of the expressions of the court on these principles are excerpted below.

> "The proposed bridges will, in some measure, cause an obstruction of navigation. * * * Bridges are highways as necessary to the commerce and intercourse of the public as rivers. If every bridge over a navigable river be not necessarily a nuisance * * * *who is to judge of this necessity?* Who shall say what shall be the height of a pier, the width of a draw and how it shall be directed, managed and controlled? Is this a matter of judicial discretion or of legislative enactment? Can

there be a nuisance which is authorized by law? In the course of seventy years of practical construction of the Constitution no act of Congress is to be found regulating such erections. * * * Where do we find any authority in the Constitution or acts of Congress for assuming it ourselves? These are questions which must be solved before this court can constitute *arbiter pontium* and assume the power of deciding where and when the public necessity demands a bridge, what is sufficient draw or how much inconvenience to navigation will constitute a nuisance. The United States has no common law offenses and has passed no statute declaring such an erection be a nuisance. If so, *a court cannot interfere by arbitrary decree either to restrain the erection of a bridge or to define its form and proportions. It is plain that these are subjects of legislative, not judicial, discretion.* (*Passaic Bridge Cases*, 3 Wall. 782.) (Bridge case.)

"It cannot be necessary to say that where a public work of this character has been inaugurated or adopted by Congress and its management placed under control of its officers (referring to the whole system of lake harbors), *there exists no right in any other branch of the government to forbid the work or to prescribe the manner in which it shall be executed* * * * While the Engineering officers of the government are, under the authority of Congress, doing all they can to make the canal useful to commerce and keep it in good condition, this court can owe no duty to a state which requires it to order the City of Duluth to destroy it." (*Wisconsin vs. Duluth*, 96 U. S. 379.) (Canal case.)

"* * * It does not appear that the Secretary disregarded the fact or that he acted in any arbitrary manner or that he pursued any method not contemplated by Congress. It was not for the jury to weigh the evidence and determine, according to their judgment, as to what the necessities of navigation required, or whether the bridge was an unreasonable obstruction. The jury might have differed from the Secretary. That

was immaterial, for Congress intended by its legislation to give the same force and effect to the decision of the Secretary of War that would have been accorded to direct action by it on the subject. *It is for Congress, under the Constitution, to regulate the rights of navigation by all appropriate means, to declare what is necessary to be done in order to free navigation from obstruction and to prescribe the way in which the question of obstruction shall be determined.* Its action in the premises cannot be revised or ignored by courts or *by juries.*" (*Monongahela Bridge Co. vs. U. S.*, 216 U. S. 177) (Bridge case.)

"So unfettered is this control of Congress over navigable streams of the country that its judgment as to whether construction in or over such a river is or is not an obstacle and a hindrance to navigation, is conclusive. *Such judgment and determination is the exercise of legislative power in respect of a subject wholly within its control.* * * * The conclusion to be drawn is that the question of whether the proper regulation and legislation of this river at the place in question required that no construction of any kind should be placed or continued in the river by riparian owners and whether the whole flow of the stream should be conceded for the use and safety of navigation, *are questions legislative in character*, and when Congress determined, as it did by the Act of March 3, 1909, that the whole river * * * was necessary for the purposes of navigation of said waters * * * that determination was conclusive. (*U. S. vs. Chandler-Dunbar Co.*, 229 U. S. 53.) (Hydro-electric power case.)

"There is little doubt that Congress, if it saw fit, in case of prevailing abuses in the management of wharf property * * might interpose and make regulations to prevent such abuses. When it shall have done so, it will be time enough for the courts to carry its regulations into effect by judicial proceedings. *But until Congress has acted, the courts of the United States can-*

> ***not assume control over the subject as a matter of Federal cognizance. It is Congress and not the judicial department, to which the Constitution has given the power to regulate commerce with foreign nations and among the several states."*** *(Transportation Co. vs. Parkersburg,* 107 U. S. 691.) (Wharf-toll case.)

We contend that Congress has acted within the intendment of its own rule in this case, and therefore that, for an even stronger reason than that just quoted, the court ought not to interfere. But if, as contended by complainants, Congress has *not* acted validly, then the case is placed squarely within the language quoted.

It is to be further observed that this is a case where no final stability of determination has yet been reached. It is perfecly apparent on the face of the permits recited in the bill that the federal government has the canal, the present diversion and the problems presented thereby, the Gulfs--to-the-Lake waterway and the whole subject of lake levels still under observation, experiment, and control. When we use the words "federal government" we mean its entire machinery. Congress, constantly and intimately cognizant of all that has happened and is likely to happen, has passed statutes requiring surveys and work on this project, and has now under consideration bills governing the diversion. The War Department has been constantly in observation and supervision, is now in much more direct control, and is concerning itself actively with all possible expedients to administer the situation. The State Department is actively negotiating with Canada on the very subject matter—lake levels—to which this complaint is addressed. It has consistently been the doctrine of this court that it should not intervene, under any such circumstances, at any suit. The principle was first expressed in one of the early classics of the court, in the following language:

"It is scarcely necessary for the court to disclaim all pretensions to such a jurisdiction (Mandamus to the President) * * the province of the court is solely to decide on the rights of individuals, not to inquire how the executive, or executive officers perform their duties in which they have a discretion * *" (*Marbury vs. Madison*, 1 Cranch 137, on 170.)

The effect, if not the intention (see legislative resolutions in back of complainants' brief and pages 129, 133, 137, 138, 140 and 142), of the present suit is to restrict, influence, control, and coerce the action and final determination of each and every of these Federal instrumentalities in dealing with this problem. We have shown that the effect on the international negotiations must necessarily be stultifying (page 46 *supra*). The effect on other departments is equally obvious. A decree by this court would produce the result desired by the complainants, but such a result would be contrary to every legal principle which should govern this case.

Said Mr. Justice Miller in *Gaines v. Thompson*, 7 Wall. 347, 352, amplifying the principle deduced in *Marbury vs. Madison* above:

"* * An officer to whom public duties are confided by law is not subject to the control of the Courts in the exercise of the judgment and discretion which the law reposes in him as a part of his official functions. Certain powers and duties are confided to those officers and to them alone, and however the Courts may, in ascertaining the rights of parties in suits properly before them, pass upon the legality of their acts after the matter has once passed beyond their control *there exists no power in the courts, by any of its processes, to act upon the officer so as to interfere with the exercise of that judgment while the matter is properly before him for action.*"

The doctrine of the only admissible basis of such a suit is defined in *U. S. vs. Calif. Land Co.*, 148 U. S. 31, 43, where it is said:

> "The only questions which can arise between an individual claiming a right under the acts done and the public, or any person denying its validity, are *power in the officer or fraud in the party.* All other questions are settled by the decision made or the acts done by the tribunal or officer, whether Executive (1 Cranch, 170), Legislative (4 Wheat, 423); 2 Pet. 412; 4 Pet. 563) Judicial (11 Mass. 227; 11 S. and R. 429; adopted in 2 Pet. 167, 168), or Special (20 Johns. 739, 740; 2 Dow P. C. 521 etc.) * * *".
>
> "* * * Until the legal title passes from the government, enquiry as to equitable rights comes within the cognizance of the Land Department. *Courts may not anticipate its action or take upon themselves the administration of the Land Grants of the United States.*" (*Oregon v. Hitchcock*, 202 U. S. 60, 70.)

In *Southern Pacific Co. v. Olympian Dredging Co.*, 260 U. S. 205, an act of the Secretary of War, under authority of the same section of the same statute pursuant to which he is acting here, was attacked as authorizing an obstruction which it was claimed could have no conceivably reasonable relation to the improvement of commerce, and this court said:

> "By the Act of September, 1890, Congress inaugurated a new policy of general, direct control over the navigable waters of the United States. * * By this legislation Congress assumed jurisdiction of the subject of obstructions to navigation and committed to the Secretary of War administrative power; * * that the Secretary of War was authorized to impose the condition heretofore quoted does not admit of doubt. *In the light of this general assumption by Congress of control over the subject, and of the large powers dele-*

gated to the Secretary, the condition imposed by that officer cannot be considered otherwise than as an authoritative determination of what was reasonably necessary to be done to insure free and safe navigation. * * The order of the Secretary directing the removal of the old piles from the bed of the river to the depth there specified was a valid order * *. *It was not for the petitioner, however, to question either his reasons or his conclusions.* They were justified in proceeding upon the assumption that the Secretary, in the exercise of his lawful powers, declared to be no obstruction to navigation what was, in fact, an obstruction (quoting from the Monongahela Bridge Co. case) *Congress intended by its legislation to give the same force and effect to the decision of the Secretary that would have been accorded to direct action by it on the subject. It is for Congress, under the Constitution, to regulate the right of navigation by all appropriate means, to declare what is necessary to be done in order to free navigation from obstruction, and to prescribe the way in which the question of obstruction shall be determined. Its action in the premises cannot be revised or ignored by the courts or by juries.*"

Another reason why the only relief possible is entirely inappropriate to the jurisdiction of this court has already been considered, namely, that what *must be done requires a continuous course of administration.* Complainants say that the only decree necessary is one to abate the diversion or to reduce it to 500 c. s. f. No such decree is possible. Unless the Chicago river be reversed enormous quantities of sewage would flow into the lake. It requires every foot of the present diversion to handle the present situation. The only decree conceivable is one whereby the court would undertake to proportion diversion to necessity daily and hourly; to supervise the construction of works to diminish it over a course of years. There is inevitably involved a

course of complicated continuing administration which this court will not undertake. (See cases cited, first paragraph, p. 56 *supra*.)

But there remains a still further reason why the court should not assume this problem. It was adverted to in the case of *Missouri v. Illinois*, where this same public work was involved, and in the same absence of so-called "affirmative authorization" by Congress. Said Mr. Justice Holmes:

> "In the case at bar, whether Congress could act or not, *there is no suggestion that it has forbidden the action of Illinois.* * * *. If we suppose a case which would not fall within the powers of Congress to regulate, the *pursuit of a declaration of rights by this court would be the establishment of a rule which would be irrevocable by any power except of this court to reverse its own decision, an amendment of the Constitution, or possibly an agreement between the states sanctioned by the Legislature of the United States.*"

Whither would the action sought by complainants lead? If this court declares that the provision by Congress of waterways for this nation is limited by the common law doctrin of riparian rights, and therefore to a rule that Congress can take no water from one channel to improve another, and that this great rock-cut must be rendered useless, down goes many a favored dream.

The proposition has been advanced by respectable authority that an inland economic area paralleled on both sides by two maritime economic areas cannot long exist in a single state, and that there are, for this reason, inherent vertical lines of cleavage in both the United States and Canada.

The principal problem now before Congress is the economic assertion that the combined effect of the tariff and

the agricultural surplus is to impose on the entire agricultural product a price in domestic markets determined by the world price at Liverpool *less the cost of transportation thither*, so that every cent saved on the transportation of each pound of such product to Liverpool *would be* added *to the domestic price of every pound of the whole crop*, and that, unless some means can be devised to accommodate the disproportion between the world price for agriculture and the protected domestic price for everything *purchased by agriculture*, we are faced with a rapidly approaching debacle in our whole economic structure. It is to be remarked further that precisely this disproportion between the prices received by the agricultural south (whose product was all of the character of "export surplus" which cannot be protected by a tariff) and the "protected" prices required from the south for the industrial products of the north, was the effective economic cause of the Civil War.

This is a consideration involved in this case and running into the hundreds of millions of dollars annually, not to mention its bearing upon the harmony and solidarity of the Union. Among the means suggested to alleviate this situation are the St. Lawrence Seaway and the Lakes-to-the-Gulf Waterway, with their promised substantial reductions in over-seas transportation costs for the agricultural regions of the interior.

The whole subject of internal waterways has, after long neglect, suddenly become extremely articulate under the pressure of fundamental economic forces. It is an inappropriate hour to urge the destruction of this canal by a fiat from this court. It seems inconceivable that a suit can be maintained on a basis which seeks the irrevocable decree of this court to establish such rights in States as would restrict the power of Congress to address these fundamental problems of national security and harmony on the only grounds offering practicable solution.

There is another consideration which we do not advance on technical grounds, but solely for the sake of the light it may throw on the political nature of this controversy.

Is this a controversy between *states* in any sense of the word? We have already here *twelve* political sovereigns, grouped seven on one side and five on the other, and a foreign sovereignty whose interests are stressed in complainants brief. The considerations which brought here Missouri, Tennessee, Louisiana and Kentucky, are equally potent to bring at least Arkansas and Mississippi, and, as we believe, Oklahoma, Kansas, Nebraska, Iowa and South Dakota. We understand that the southern and western four-fifths of Minnesota is ranged against the rest of that state as to which side her representation here should take.

Is this not rather a contest between economic areas than a contest between states? And if such be the case, is this court the tribunal to *compose* their differences? *And if it is, have any such arbitrary and absolute rights as are advanced as the basis of this suit any place in the consideration of it?*

We think the questions answer themselves. We cannot conceive that the controversy of 1861 could ever have been here composed. We think that the Congress was devised and intended by the Constitution for such purposes as this. One state is not the nation—but 48 states are. When a controversy assumes such proportions and takes such directions as this one has assumed and taken, we believe the question *ipso facto* becomes political, and whether it does or not, the principles which should govern it were well laid down by Mr. Justice Clark, in *New York v. New Jersey* 256 U. S. 296, where he said:

> "* * We cannot withhold the suggestion inspired by a consideration of this case that the grave problems of sewage disposal presented by the large and growing

populations living on the shores of New York Bay is one more likely to be wisely solved by co-operative study and by conference and mutual concession on the part of representatives of the states so vitally interested in it than by proceedings in any court, however constituted."

We think this bill should be dismissed because it asks the court to invade the constitutional functions of the legislative and executive departments.

III.

The United States and other states are indispensable parties.

We have developed the legal basis for this point sufficiently in our first brief. Complainants' replication is the rather astonishing dictum that neither the United States nor sister States have any interest in the relief sought here. This admits the principle, but denies the conclusion of interest. We think the interest of all absent parties is sufficiently developed in our two briefs.

As to the interest of the United States, it should be sufficient to say that the ink was hardly dry on the decree governing this matter at her suit in this Court when the amended bill was filed. It is her duty to regulate this matter. She sought here the kind of a decree her interest required. Her interest to preserve the diversion in such amount as she found necessary was vindicated and established by this court. In principle, at least, *the existence of her interest has been determined and adjudged here and this is a suit to upset that adjudication.*

The United States had an interest to prevent what she believed to be a diversion in excess of the requirements of navigation, but she has an equal interest to preserve what she believes to be a diversion appropriate to navigation.

Regulation of navigation is her duty, proper navigation is her right, and the determination of what is proper navigation is her function. The decree sought would impair her interest, and she is a necessary party.

We must next consider the reasons asserted against the interest of sister states. Complainants say: "The sister states which do not border upon the Great Lakes—St. Lawrence waterway—**can have no possible rights other than in navigation.**" (Complainants' Brief, page 66.)

We cannot forbear to inquire: *On what rights, other than rights in navigation, are the complainant states themselves here?* Certainly their bill is based on their rights in the navigable capacity of interstate waterways, and on those rights alone. The injury they assert is an injury to navigation, and it is that alone. The only possible construction that could be put on this contention is that the states complainant have some *monopoly* on the navigation of the Great Lakes. This is too slight to consider.

The inevitable conclusion on the face of the pleadings is that, if a right in navigation will not qualify absent sister states as parties, then certainly it could not qualify the states complainant as parties. This is precisely our contention, and *we find here a concession by the states complainant that this bill ought to be dismissed on the very grounds we urge.*

Here, as consistently elsewhere throughout the bill, the complainants fail to apprehend the distinction between their suit and the suit of the United States in *Sanitary District vs. United States*, 266 U. S. 405. In that suit the Court was asked to vindicate a regulation of commerce by the federal government and to require the Sanitary District to comply with the regulations of the Secretary of War under the authority of Congress. Some of the river states

intervened, seeking to justify what the Court found to be the then illegal diversion on the ground of their interest in having the illegal excess come to them. The Court found that they had no such interest. The question here is entirely different. What these complainants are seeking to do is to restrain a legal diversion authorized and continued by the United States in the proper regulation of commerce, as well for the benefit of the sanitary situation on a highway of commerce as for the increased navigability of the waters flowing along the borders of the absent river states. Certainly these sister states have a right in the increased navigable capacity of their waters thus legally vouchsafed to them.

If it be said, in *this* case, that they have no right because the increased navigability is artificial, then precisely the same consideration would, as we believe it does, exclude the suit of these complainants, because the injury they claim is to the navigable capacity of certain named harbors and, as we have shown, *such navigable capacity, in respect to every one of them, was artificially created by the United States.*

Surely an urging by the complainants against the juridical interest of absent sister states in the navigable capacity of interstate waters is a two-edged sword. They cannot minimize that interest without minimizing their own. They cannot abate it without stating their own case out of court.

Another error that complainants make throughout their brief is that under the circumstances of this case, diversion for sanitation has no relation to inter tate commerce. We have demonstrated the error (p. 34). It is this error, among others, which leads them to cite the case of *Kansas vs. Colorado* in support of their contention that the United States is not an essential party. It is true that, in that case, the court held that the claim of the United States to regulate diversions along the Arkansas river (which

was rested on a claimed Constitutional function to regulate arid lands), was without foundation, because the Constitution granted it no such power. But the court was alert to determine, before it denied the petition of the United States to intervene and before it proceeded to any consideration of the bill of Kansas, whether the waters in question were navigable. The court strongly intimated that if it had so found it would have allowed the petition and would also have dismissed the bill. The case of *Kansas v. Colorado*, therefore, is directly contrary to the contention for which it is cited—namely, that in a bill, the object of which is to abate a federal administrative regulation of commerce, brought by a state in circumstances where the relief prayed for would violently disorganize an entire system of navigation created and administered by the Federal Government, the United States is not a necessary party.

Similarly inapposite is the case of *New York vs. New Jersey*, 256 U. S. 296, a suit by New York to resist invasion of physical domain by great discharges of sewage. The court permitted intervention by the United States and postponed entirely consideration of the case until her interests had been composed by stipulation. From the circumstance that the suit then proceeded, complainants contend that the case determines that the United States had no necessary interest. The case compels a contrary conclusion. The United States was a party until its interest was satisfied. That the case went on resulted from the fact that the State of New York had a good bill in the first instance. The case is otherwise here.

Kawananako vs. Polybank, 205 U. S. 349, which is the only case quoted in support of complainants' contention, directly and explicitly refutes it.

IV.

The bill well avers no injury.

In our first brief we showed, by an analysis of the aver-

ments of the bill, that it asserted no actual or special injury to the states complainant, but rested on the assertion that, if the lakes be lowered six inches, six inches will be reduced from the depths of their harbors and, consequently, from the drafts of the largest ships that could enter them, and thus from the carrying capacity of such ships, and that this would increase lake rates. We showed that the bill had been drawn with care in order to avoid asserting that such an injury had happened or was actually threatened in practice. We showed the extreme improbability of any such injury ever occurring and concluded that the bill well averred no injury whatever.

All this was not intended as a *tour de force* of technicality. It was intended to call the attention of the court to the true nature of this controversy. The lower court in the federal suit reached practically the same conclusion, that there has been no real injury in navigation of the Great Lakes (p. 41 *supra*).

Complainants now restate and paraphrase the averments of their bill, but they add nothing to this deficiency. The restatement of the bill on this point is:

> "That the Great Lakes, *excepting Lake Superior*" (this averment should oust Minnesota) "*and connecting waters, and St. Lawrence river* have been lowered not less than six inches by such abstraction of water by defendants, and that such lowering has reduced the *possible* loading of vessels thereon by at least six inches and has reduced their cargo-carrying capacity by many tons, with a resultant increase of freight costs" (this is a conclusion of the pleader) "to the people of complaint states and to the State of Wisconsin in its proprietary capacity. That the carriage of coal by such vessels constitutes the principal source of supply of coal for the State of Wisconsin and its people; that such lowering has lessened the utility of all

> of the ports of said Lakes and connecting waters of said Lakes, and that the total annual loss due to the lower carrying capacity of lake vessels, chargeable to the abstraction of such water, amounts to many millions of dollars.'

This still amounts merely to an assertion that if lake vessels were constructed to utilize the entire capacity of these harbors and were loaded to their maximum capacity lake rates would be reduced, and that the fact that this has not been done leaves lake rates where they are, rather than as low as they might be.

We have shown that all these harbors differ in depth, and that their depth fluctuates widely and constantly, and that, in their natural state, they were, in nearly every instance, entirely incapable of receiving modern lake transportation. Their entire facility in this regard is created by the artificial works of the United States, just as is the diversion complained of.

Even had the complainant states shown an actual injury in this regard, the injury necessarily resides in a claimed reduction in the navigable capacity of the Great Lakes and the harbors thereof. Indeed that is the only substantial injury referred to or mentioned any place in the bill. As we showed in our first brief, that is an injury to the citizens of the complainant states and not to the states themselves, and not even to the citizens in their capacity as citizens of the complainant states. We shall expand this subject in the divisions of this brief which relate to the rights upon which such injuries are based. Suffice it here to say that a state cannot bring an action on the rights of her citizens, no matter how many they be, because such an action is inhibited by the eleventh amendment to the Constitution of the United States. The cases that have reference to the number of citizens injured, in discussing the jurisdictional questions involved, have rested the decision as to jurisdiction on the *quasi* sovereignty of the state, but,

as we shall hereafter show, there is no *quasi* sovereignty of a state in the navigable capacity of interstate waters.

Complainants seek to make a distinction between their capacity as *quasi* sovereigns and their capacity as *parens patriae* of the rights of all their citizens. If this distinction means that a state may bring a suit which is properly based on the rights of its citizens it is a distinction inhibited by the Constitution. As we show herein (pages 54, 55, 89 *et seq*). No person can bring an action on the right of another person.

Apprehensive, apparently, of this weakness in their bill, complainants have attempted in their brief to shift the whole theory of their case and to import rights arising from the common law doctrine of riparian rights. We have addressed this contention in point V-a hereof, beginning at page 77.

V.

There was never a property right in the States complainant in the navigable capacity of these waters and the doctrine of riparian rights in no wise alters this rule.

Complainants insist that the right of a state in its littoral waters is the right of ownership and property therein. This contention is necessary to their suit if we are correct in contending that they have no sovereignty in the navigable capacity of interstate navigable waters. It is to be noted that we are speaking of only one aspect of the waters involved—that is, their navigable capacity.

Complainants say they are "*owners of all the public waters and the submerged lands within their respective borders.*" We insist that whatever may be their rights as to other aspects of such waters, they have no property in their ***navigable capacity***, and that otherwise their rights are

quasi sovereign and not property rights in the sense in which the word "property" is used in the Constitution. We think that they have no such *property* in waters at all, but merely a *jus regium*, regardless of some of the language in the cases they cite. The language in every instance was used *arguendo*. Whenever the court has had to pass upon this question it has decided against any suggestion of such a "property" right.

In *Gilman vs. Philadelphia*, 3 Wall. 713, referring to the absolute power of Congress over the matter of navigable rivers, the court said:

> "For that purpose *they are the public property of the nation* and subject to all the requisite legislation of Congress. * * * *For these purposes Congress possesses all the powers which existed in the states before the adoption of the national Constitution.* * * * Although the *title* to the shores and submerged soil is in the various states and individual owners under them, *it is always subject to the servitude in respect of navigation created in favor of the Federal government by the Constitution.* * * * *The primary use of waters* * * * *is for the purpose of navigation.* * * *"

In *United States vs. Chandler-Dunbar Co.*, 229 U. S. 53, the court said:

> "Whether this private right for the *use of the flow of water* be based upon the qualified title which the company had (from the state) to the bed of the river over which it flows, or of the ownership of land bordering upon the river, is of no prime importance. *In neither event can there be said to arise any ownership of the river.* * * * That the running water in a great navigable stream is capable of private ownership is inconceivable. * * * That riparian owners upon public navigable rivers have, in addition to the rights common to the public, certain rights to the use and enjoyment of the stream must be conceded. * * *

> *These additional rights are not dependent upon the title to the soil over which the river flows, but are incident to the ownership upon the banks.* * * * It is for Congress to decide what is and is not an obstruction to navigation. * * * *Title is absolutely subordinate to the rights of navigation.* * * *"*

To base a suit upon this kind of a property right is a doctrine which has been rejected by this court.

In *Hudson Co. vs. McCarter*, 209 U. S. 349, where the suit was brought by a state against a private trespasser, Mr. Justice Holmes said:

> "We prefer to put the authority which cannot be denied in the state upon a broader ground * * * since, in our opinion, *it is independent of the more or less attenuated residuum of title that the state may be said to possess.* * * *"*

Indeed, it is a doctrine as old as the common law, that running water is not subject to ownership.

In Geer vs. Connecticut, 161 U. S. 519, referring to a similar doctrine in respect of wild animals, the court said:

> "We take it to be correct doctrine that ownership of wild animals, so far as they are capable of *ownership, is in the state, not as a proprietor, but in its sovereign capacity as the representative and for the benefit of all its people in common.*"

V-a.

Complainants add nothing to their claim of property rights by invoking the common law doctrine of riparian rights.

This is a controversy solely in respect of the *navigable capacity of interstate and international waters.* The doctrine of riparian rights has no place in it. No right or injury is averred in the bill, except with relation to navigable

capacity. There is no showing, as indeed there could be none, that anybody's riparian rights of user have been impaired. The riparian doctrine is dragged in as an afterthought, in a desperate effort to remedy the total lack of the state's right of dominion or property in such navigable capacity, and thus to attempt to save their standing in this court.

As we have shown (p. 44 *supra*), the doctrine of riparian rights in a flowing stream have no application to the physical characteristics of the Great Lakes. This alone should conclude the contention.

That any application of such a doctrine should control a case like this was remarked upon by Mr. Justice Holmes in *Missouri vs. Illinois*, 200 U. S. 496, an equity suit aimed at this canal and one effect of this diversion;

> "* * * It does not follow that every matter which would warrant a resort to equity by one citizen against another in the same jurisdiction equally would warrant an interference by this court with the action of a state. It hardly can be that we should be justified in declaring statutes or deeming such action void in every instance where the Circuit Court might interfere in a private suit *upon no other ground than an analogy to some selected system of municipal law and the fact that we have jurisdiction over controversies between states.*"

If the analogy *should* govern, however, it ought to govern completely, and, if so, the suit fails, because on the face of the bill it appears that user of Illinois has continued through twenty years of acquiescence and silence on the part of these complainants (See *Michigan vs. Wisconsin*, not reported, decided by this court on March 1, 1926). Therefore Illinois has a prescriptive right of over twenty years' user in the diversion, which, under the laws of all the states litigant here, is sufficient to conclude the controversy, and the co-

istence of which appears on the face of the averments of the bill, and in addition thereto, the rights asserted by complainants have long since been foreclosed by the Statutes of Limitation in those states. The facts supporting this contention are patent in the bill.

But regarding the character of the issues here presented, we believe that consideration will not proceed upon strict and technical analogies derived from a system of law appropriate to the vindication of the so-called absolute rights in private controversies.

The subject matter of this suit is *water*. In most aspects waters are in the exclusive dominion of the state. But that dominion *is not proprietary*. It is simply a *jus regium*—a right to regulate. From this *jus regium* flow riparian and all other water rights. They do not flow from *property* in the state. The subject was thoroughly expounded in *Illinois Central Ry. vs. Chicago*, 146 U. S. 387, holding that a state has no such "property" as can be conveyed.

> "The ownership and dominion over lands covered by tide waters belong to the respective states * * * *subject to the paramount right of Congress to control navigation* * * * *The same doctrine is held to be applicable to* * * * *the Great Lakes. These lakes possess all the general characteristics of open seas*, except in the freshness of their waters and in the absence of the ebb and flow of tide. In other respects they are inland seas. * * * * *The same doctrine as to the dominion and sovereignty* * * * *of lands under the navigable waters of the Great Lakes applies which obtains at common law* * * * of lands under tide waters * * *.
>
> "The state holds the title to the lands under the navigable waters of Lake Michigan * * * *but it is a title different in character from that which the state holds in lands intended for sale.* It is a title held in

trust * * * the [illegible] is not consistent with the exercise of that trust * * *. The control of the state for the purpose of the trust can never be lost." * * * General language sometimes found in opinions of the courts expressive of absolute ownership and control by the state of lands under navigable waters, irrespective of any trust as to their use and disposition, must be read and construed with reference to the special facts of the particular cases.

"* * * The power exercised by the state over the lands and waters is nothing more than what is called *jus regium*,' the right of regulating, improving and securing them for the benefit of every individual citizen. * * * (Referring with approval to the case of *Stockton vs. Railroad Co.*, 32 Fed. Rep. 9.) *The character of the title of ownership by which the state holds the state house is quite different from that by which it holds the land under the navigable waters in and around its territory.* * * * Prior to the Revolution the shore and lands under water of navigable streams and waters of the province of New Jersey belonged to the King. * * * *After the conquest the state lands were held by the state as they were by the King, in trust * * subject * * to the rights of navigation and commerce.* * * *"*

(See the quotation from *Gilman vs. Philadelphia*, p. 76 *supra*, as to the evolution of this trusteeship from the state to the nation in respect of the navigable capacity of interstate waters.)

This doctrine is established law. The cases in complainants' brief, without exception, support it.

Riparian rights, therefore, derive *from the state and from* a sovereignty that has been excluded from the United States. Those rights are in the same subject matter (waters), in respect of which the right of navigation inures. Not that in the end of an [illegible] between them. Riparian rights inhere in ownership of the soil along the

banks (*U. S. vs. Chandler-Dunbar Co., supra*) and are not personal. They, and the right of state dominion from which they flow, are absolute, as this court in that case said also:

> "The private right to appropriate is subject * * * to the initial limitation that it may not substantially diminish one of the great foundations of public welfare and health. * * * It (the state) finds itself in possession of what all admit to be a great public good, and *what it has it may keep and give no one a reason for its will.*" (*Hudson Water Co. vs. McCarter*, 209 U. S. 349, at 356.)

Rights of navigation, on the other hand, constitute a *personal privilege*. They have been well described in *Frost vs. Washington Ry.*, 97 Me. 76, as follows:

> "This right of plaintiff was not his private property, nor even his private right. It could not be bought, sold, leased or inherited. He did not earn it, create it, or acquire it. He did not own it as against the sovereign. The right was the right of the public, the title and control being in the sovereign in trust for the public and for the benefit of the general public, and not for any particular individual. * * * Plaintiff * * * had no right against the public. The sovereign had the absolute control of it and could regulate, enlarge, limit, or even destroy it, as he might deem best for the whole public; *and this without making or providing any compensation.* * * * *The sovereign cannot take private property* * * * *without* * * * *compensation* * * * *but the constitutional provision does not limit the power of the sovereign over public rights* * * *"

Such cases as *Gibson vs. U. S.*, 166 U. S. 269, show that *riparian rights are not property in the sense of the fifth amendment*. Such cases as *Gilman vs. Philadelphia*, 3 Wall 713, show that rights of navigation are not property.

Both proceed from sovereignty of a State and not from property of a State. The difference is that riparian rights proceed from a sovereignty of the State in a matter in which the United States has no sovereignty, while rights to navigate interstate navigable waters proceed from the sovereignty of the United States in a matter in which the State has no sovereignty.

> "* * * A citizen of the United States has the right to come to the seat of government * * * to free access to its seaports * * * the right of the State to impede * * * the right which its citizens hold under it (the United States) has been universally denied. * * * If the right of passing through a State is one guaranteed to him by the Constitution * * * it must be sacred from State taxation * * *." (*Crandall vs. Nevada*, 6 Wall, at 46).

> "* * * The right to use the navigable waters of the United States * * * are dependent upon citizenship of the United States and not citizenship of a State * * *." (*Slaughter House Cases*, 16 Wall 36, 79.)

And, as has so often been decided here, when the two rights come into conflict, the sovereignty of the United States and the navigation right proceeding from it dissolve and completely deflect from consideration this aspect of sovereignty of a State and riparian rights proceeding from it.

This is strikingly demonstrated in the very case upon which complainants principally rely, *U. S. vs. Rio Grande Dam and Irrigation Co.*, 174 U. S. 690.

A dam company, proceeding under authority of a State to abstract waters from the Rio Grande, collided with the authority of the United States over navigation. This court,

conceding this right in and from the State, nevertheless cut it off at the precise point where it, in any degree, affected the Federal sovereignty in navigation and the rights flowing therefrom.

A similar result has been reached here time and again: *U. S. vs. Chandler-Dunbar Co.*, 229 U. S. 53; *Economy Light & Power Co. vs. U. S.*, 256 U. S. 113 (power rights); *Gibson vs. U. S.*, 166 U. S., 269; *Scranton vs. Wheeler*, 179 U. S. 141 (right of access); *Philadelphia Co. vs. Stimson*, 223 U. S. 605 (property rights); *South Carolina vs. Georgia*, 93 U. S. 4 (contract rights).

Complainants contend, nevertheless, that the cases of *Kansas vs. Colorado*; *Colorado vs. Wyoming*; *Minnesota vs. South Dakota*, and *U. S. vs. Rio Grande Dam Co.* are authorities to the contrary.

We have just shown that the last case cited carries a reverse intendment. So also do the others.

The riparian doctrine is one of absolute right. Accordingly, Kansas in her bill so asserted it and demanded the water of the Arkansas without substantial diminution. There the court said:

> "Turning now to the controversy as here presented, it is *whether Kansas has a right to the continuous flow of the waters of the Arkansas river, as that flow existed before any human interference therewith*, or Colorado the right to appropriate the waters of that stream so as to prevent that continuous flow, *or that the amount of that flow is subject to the superior authority and supervisory control of the United States.* * * * If Colorado is diminishing that flow, has it an absolute right to determine for itself the extent to which it will diminish it, even to the entire appropriation of the water? And if it has not that absolute right, is the amount of appropriation that it is now

making such an infringement upon the rights of Kansas as to call for judicial interference?"

All of these questions were answered in that decision. Even though the evidence showed that Colorado was taking an enormous proportion of the stream, *the court declined to interfere.* The effect of that decision is absolutely fatal to complainants' contention here that riparian rights, *as between States*, carry any absolute right to *the flow without substantial* diminution. The court, in effect, did what Mr. Justice Holmes, in *Missouri vs. Illinois*, said it ought to do—declined to entertain the case on any "analogy to some selected system of municipal law." The case is an authority against the principal contention of complainants' brief—i. e., that complainants standing gains anything here by the invocation of the name of the common law doctrine of riparian rights.

But the reliance on that case carries a still greater peril to complainants' bill. Before considering the case at all, the court asked:

> *"Is the question one solely between the States, or is the matter subject to national legislative regulation, and if the latter, to what extent has that regulation been carried? * * *"*

There was a strong intimation that if the court had found the subject matter one of national regulation, the bill would have been dismissed. But the stream was found to be not navigable, and the Federal Government not to be properly in the case.

In the present case, the only subject matter is navigable capacity. The Federal Government has assumed complete control of it. The object of the suit is to coerce and dominate its discretion in the administration thereof. The case

of *Kansas vs. Colorado* is directly against complainants' contention *at every point.*

Complainants reason thus: The United States was excluded from that suit because its claimed right was in arid lands—a subject not entrusted to it by the Constitution. Its right should be abated here (they say) because one use of the canal is sanitation—a subject not entrusted by the Constitution to the Federal Government. The answer to this is double.

(1) Sanitation, in this case, is necessary to navigation.

(2) The canal and diversion through it are themselves facilities of navigation and part of one integral system completely dominated by Congress.

But *Kansas vs. Colorado* strikes down, also, other contentions of complainants. They say, "because Illinois admits the common law doctrine of riparian rights, she must be governed by it. *Kansas vs. Colorado* says that the "** * * power of changing the common law rule as to streams within its dominion undoubtedly belongs to each State.* * * *"

Wyoming vs. Colorado is to the same effect. Illinois has not changed the common law *in general,* but as to the Sanitary District she has changed it. If Illinois can do it *in general,* complainants should not be heard to say that she cannot do it *in particular.*

The decision in *Wyoming vs. Colorado* was the precise reverse of an admission of any principle that, as between States, either has an absolute right to the flow of a stream from one to the other, "substantially undiminished." The question was of the right *to take all the water* of such a stream. There is no such question here. Here the com-

plainants say to Illinois, "You can take none." Such a dictum was definitely decided against in both *Kansas vs. Colorado* and *Wyoming vs. Colorado*. In both cases substantial impairment of rights of user and flow were demonstrated. Yet the bills were dismissed because the impairment was "reasonable." Here no impairment whatever is averred or involved. There is nothing to decide. There remains an abundance of water for every purpose considered in both of those cases. The cases are both contrary to complainants' contentions at every point.

Wyoming vs. Colorado strikes down the contention that there is any magic in watersheds. If the diversion is good, of what relevancy is its destination? This matter in this case was settled in *Missouri vs. Illinois*.

> "The natural features relied upon are of the smallest, and if under any circumstances they could affect the case it is enough to say that Illinois brought Chicago into the Mississippi watershed in pursuance not only of its own statutes, but also of the Acts of Congress of March, 1822, and March, 1827, the validity of which is not disputed."

The same principle abolishes the contention that lower States obtain any right because they can generate more power by use of the water diverted than can Illinois. If the diversion is lawful, of what relevancy is the use of the water? Such, in effect, was the conclusion of the court in *Wyoming vs. Colorado*. In *U. S. vs. Chandler-Dunbar Co.*, the court said: "If the primary purpose is legitimate, we can see no sound objection to leasing any excess of power over the needs of the Government." See *Kaukauna Water Power Company vs. Green Bay*, 142 U. S. 254.

There can be no doubt that the right of a State in the navigable capacity of interstate navigable waters is not a property right. It is an incident of sovereignty but not of any sovereignty of a state. (See p. 94 *infra* as to police power).

VI.

Sovereign rights of the States complainant in the navigable capacity of these waters have been completely appropriated by the United States to the exclusion of the States complainant.

1. By the Constitution

In addressing this branch of the consideration by itself it is necessary to assume; that Congress has passed no prohibitory legislation but that it has created the artificial system of lake navigation described at pages 24, 42, 58, 103; that Congress has had full knowledge of all Acts of Illinois and of the effect of them to improve the waterway to the south and incidentally to affect the waterway north. (Pages 21 to 34 *supra*).

We have already shown (p. 17 *supra*) that when the act alleged here to be wrongful was authorized and commenced by Illinois, there was no principle of law that required the state to obtain an act of Congress authorizing what she was about to do.

> "Calumet river, it must be remembered, is entirely within the limits of the State of Illinois, and the authority of the state over it is plenary, subject only to such action as Congress may take. * * * (*Cummings v. Chicago*, 188, U. S. 410).
>
> "The full power resides in the states as to the erection of bridges and other works on navigable streams wholly within their jurisdiction in the absence of the exercise by Congress of authority to the contrary. * * *" (*Lake Shore & Michigan Southern Ry. v. Ohio*, 165 U. S. 365).

"* * * Congress must first legislate before the courts can proceed upon any such ground of paramount jurisdiction. * * * There is not at present any federal law on the subject by which relief can be obtained. In the various bridge cases * * * the refusal to interfere with their erection has always been based upon the absence of prohibitory legislation by Congress, and the power of the states over the subject in the absence of such legislation." (*Passaic Bridge Cases*, 3 Wall. 782).

"At the time the boom was constructed, Congress had not, by any legislation, asserted its authority over nor taken into its own jurisdiction the subject of obstructions to the navigation of this river. * * * Congress, it must be assumed, was aware of the fact that until it acted upon the subject of navigable streams, which were entirely within the confines of a single state, *although connecting with waters beyond its boundaries*, that such state had plenary power over the subject. * * * When Congress in 1890 passed the River and Harbor Bill, we think the expression contained in Section 10 in regard to obstructions not affirmatively authorized by law, meant not only a law of Congress but a law of the state * * *. If the obstruction were affirmatively authorized by a law of the state, it did not come within the condemnation of the section, and its continuance was therefore valid. * * *" (*U. S. v. The Bellingham Bay Boom Co.*, 176 U. S. 211.)

Such citations could be multiplied. We think those quoted are sufficient to show that, omitting at all to consider the acts of 1390 and 1899, the construction and operation of the canal were of themselves no violation of any federal principle relating to interstate commerce and navigation. If this be so, *upon what right could another state base a suit in this court?* The case here emphatically answer that, *in such a case as this*, she has no such right. As we have shown, (p. 53 *supra*) she must come here either on her own direct property right, or on her rights as a quasi sovereign, and she cannot, in the absence of

any sovereign right in herself, come in solely on the rights of her own citizens, because to do so would violate an express constitutional prohibition. We think the cases discussed above show conclusively that neither she nor her citizens have any *property* right in the navigable capacity of interstate waters. The same cases demonstrate that, in the same manner, both sovereignty and dominion in such navigable capacity are in the United States and not in any state. (*South Carolina v. Georgia*, 93 U. S. 4; *Gilman v. Philadelphia*, 3 Wall. 713; *Hardin v. Jordan*, 140 U. S. 371; *Scranton v. Wheeler*, 179 U. S. 141; *Louisville Bridge Co. v. U. S.*, 242 U. S. 409; *Shively v. Bowlby*, 152 U. S. 1; *Union Bridge Co. v. U. S.*, 204 U. S. 364; *Yates v. Milwaukee*, 10 Wall. 497; *U. S. v. Chandler-Dunbar Co.*, 229 U. S. 53; *Gibson v. U. S.* 166, U. S. 269; *Cooley v. Board of Wardens*, 12 How. 299; *U. S. v. Rio Grande Dam & Irrigation Co.*, 174 U. S. 690).

The right to navigate the navigable waters of the United States is enjoyed in one's capacity as a citizen of the United States and not as a citizen of a state (see discussion and cases, p. 45 *supra*).

The state having neither sovereignty nor property, has no ground upon which to rest her case in the absence of a prohibition by a constitution or law of the United States.

A suit cannot be maintained by one party on a right of another party. Nor can it aver a "right guaranteed by the constitution" unless the guarantee runs to the person suing. (See page 54 *supra* and cases there cited). The same principle applies to states, and so we see that a state cannot sue to vindicate the sovereignty of the United States. A state is not "*parens patriae*" of the rights of citizens of the United States. Mr. Justice Sutherland, in *Massachusetts v. Mellon*, 262 U. S. 447, said:

"We come next to consider whether the suit may be maintained by the state as the representative of its citizens. * * But these citizens of Massachusetts are also citizens of the United States. *It cannot be conceded that a state, as parens patriae, may institute judicial proceedings to protect citizens of the United States from the operation of the statutes thereof.* While the state, under some circumstances, may sue in that capacity for the protection of its citizens (*Missouri v. Illinois*), it is no part of its duty or power to enforce their rights in respect of their relations with the Federal government. In that field it is the United States and not the states which represents them as *parens patriae* when such representation becomes appropriate. * * *"

To the same effect are *Louisiana v. Texas*, 176 U. S. 1; *Oklahoma v. Atchison Ry.*, 220 U. S. 277; *Oklahoma v. Gulf, etc. Ry.*, 220 U. S. 290.

All of these principles seem to us to be very clear. Complainants insist that cases decided here stand against our contention, and it becomes necessary to consider the cases advanced to support their insistence. The case they stress is *Pennsylvania v. The Wheeling, etc. Bridge Co.*, 13 Howard 518. We doubt if any case has been so frequently or so variously explained. If it be said that the right of Pennsylvania in that case proceeded on its sovereignty, the opinion of the court twice expressly refutes the view and rests the case on a very distinct and substantial property right. There the court said:

"In this case *the State of Pennsylvania is not a party in virtue of its sovereignty. It does not come here to protect the rights of its citizens.* * * * *Nor can the state prosecute this suit on the ground of any remote or contingent interest in itself* " (like a fraction of a cent a ton on the relatively small amount of coal for public buildings.)" It avers their claims in an abstract

right by a direct interest in the controversy. * * * In the present case *the rights asserted and relief prayed are considered as in no respect different from those of an individual. From the dignity of the state the Constitution gives to it the right to bring an original suit in this court, and this is the only privilege, if the right be established, which the State of Pennsylvania can claim in the present case.* * * * The State of Pennsylvania claims *nothing connected with the exercise of sovereignty.* It asks from the court a protection of its *property on the same ground and to the same extent as a corporation or individual may ask it.* * * *"*

In *Missouri v. Illinois*, Mr. Justice Holmes speaks of that case in this way:

"The first question to be answered was put in the well-known case of the Wheeling Bridge. The question was put most explicitly by the assenting judges, but it was accepted by all as fundamental. The first justice observed that if the bridge was a nuisance it was an offense against the sovereignty whose laws had been violated, and he asked what sovereignty that was. * * * It could not have been Virginia because the state had purported to authorize it by statute. The first justice found no prohibition by the United States. No third source of law was suggested by anyone. The majority accepted the first justice's postulate and found an answer in what Congress had done." (Referring to a compact between Virginia and Kentucky which was held to have become a law of the Union by sanction of Congress regulating commerce and rendering unconstitutional a state law which violated it). "At a later stage of the case, after Congress had authorized the bridge, it was stated again in so many words that the ground of the former decision was that the act of the legislature of Virginia afforded no authority or justification. *It was in conflict with the acts of Congress.*"

In *Missouri v. Illinois*, Mr. Justice Holmes said of the canal and diversion here: "* * * *There is no suggestion that*

Congress had forbidden the action of the State of Illinois."

On this convergence of authority, in the last two sentences just quoted, how can Wisconsin sue here?

This view of the Wheeling Bridge case seems to us the one most consistent with the controlling principle. It absolutely abolishes the contention of complainant that *that* case justifies *this* suit.

In *Louisiana v. Texas*, 176 U. S. 1, this court said that the Wheeling Bridge case rested on the *property right* of Pennsylvania and in the *Passaic Bridge Cases*, 3 Wall. 782, Mr. Justice Grier said the Wheeling case rested on a monopoly threatened to be created in Virginia by the bridge. None of these interpretations of the case can bring any comfort to complainants.

But they say, "*We have a property right in the increased price we pay for coal for public buildings*" (the increase being due to increased lake freights as applied to coal—the increase in freight being due to six inches less depth in the artificial harbors in Wisconsin).

De minimus non curat lex. If this attempt did not flow from the dignity of a state, we might employ complainants' characterization of one of our contentions—"ridiculous." It is like the case in Mother Goose of the fire that burned the stick, that beat the dog, that worried the cat—and so on to the apple dumpling.

Said Mr. Justice Holmes in *Missouri v. Illinois*, "Before this court ought to intervene the case should be of serious magnitude, clearly and fully proved, and the principle to be applied should be one which the court is prepared deliberately to maintain against all considerations on the other side * * *" and in *Georgia v. Tennessee Copper Co.*, 206 U. S. 230, 237, "The alleged damage to the state as a private own-

er is merely a makeweight * * *" And, in the Wheeling Bridge case, the court said, "nor can the State prosecute this suit on the ground of any remote or contingent interest in itself."

The present case falls squarely within these principles and there is not an iota of right on which to base this suit.

There is no record in the annals of this court of a state maintaining a suit against another state on its "sovereign right" in the navigable capacity of interstate navigable waters. All the other cases relied upon by complainant stand on entirely different ground. The cases are *Kansas v. Colorado*, 206 U. S. 46; *Missouri v. Illinois*, 180 U. S. 208; *Georgia v. Tennessee Copper Co.*, 206 U. S. 230; *North Dakota v. Minnesota*, 263 U. S. 365; *New York v. New Jersey*, 256 U. S. 296; *Pennsylvania v. West Virginia*, 162 U. S. 553; *Wyoming v. Colorado*, 259 U. S. 419; *U. S. v. Rio Grande Dam & Irrigation Co.*, 174 U. S. 690; *Hudson Water Co. v. McCarter*, 209 U. S. 349.

They are easily disposed of. *Not one of them was based on an alleged sovereign right in the navigable capacity of interstate waters.* For convenience they may be grouped under three heads:

(1) Irrigation and riparian rights—*Kansas v. Colorado, Wyoming v. Colorado, U. S. v. Rio Grande Dam & Irrigation Co., Hudson Water Co. v. McCarter.*

(2) Invasion of physical domain by projection of objectionable matter across interstate borders. *Georgia v. Tennessee Copper Co., New York v. New Jersey, Missouri v. Illinois, North Dakota v. Minnesota.*

(3) Unconstitutional state law seeking to regulate and restrict purchase and sale of a commodity in interstate commerce and substantially affecting direct property rights of the state and health of inhabitants. *Pennsylvania v. West Virginia.*

The feature which distinguishes all these cases from the

present case and controls consideration of them is that *they all rested on an unimpeachable right of quasi-sovereignty.* We have already disposed of *Kansas v. Colorado* (page) 71, 83), *Wyoming v. Colorado* (p. 84), and *U. S. v. Rio Grande Dam & Irrigation Co.* (p. 82). The first two rested on the sovereign right of a state to control the uses of water in all its streams for irrigation, *and the waters were not navigable. Kansas v. Colorado* expressly held that if the stream in question had been navigable, this quasi-sovereignty *would have vanished* in the presence of the paramount sovereignty of the United States at least in so far as the question of navigable capacity is concerned. In *U. S. v. Rio Grande Dam & Irrigation Co.* the quasi-sovereignty of the state *did vanish* in that presence. *Hudson Water Co. v. McCarter* was simply a case of trespass by an individual against the conceded dominion of the state over its waters. It *has* such dominion in respect of almost everything concerning waters, except in the *navigable capacity* of interstate navigable waters. As to intra-state navigable waters the state has the same dominion that she has over intra-state commerce. As to her purely permissive power to authorize obstructions in and, to a certain extent regulate, interstate waters within her borders, it does not flow from any sovereignty in their navigable capacity. It flows from the police powers and the implied authority of Congress to act in an ancillary capacity in respect thereof.

The second class of cases is equally simple. Surely a state has a *sovereign right* sufficient to come here and complain against something analogous to assault and battery—a gas or a sewage barrage across its borders. It is most instructive to note, however, that in *New York v. New Jersey* the United States intervened on its paramount sovereignty. When it did so everything else awaited its satisfaction. When that was accomplished the case proceeded upon the perfectly good basis on which it began—invasion of

physical domain by projection of filth across the interstate borders, and with no question of navigable capacity involved.

North Dakota v. Minnesota involved no question of navigable capacity. The assault across the borders there was by a projection of flood waters destroying broad acres of tilth. There is nothing in the case to distinguish it from the other invasion cases, and nothing to bring it within the circumstances of this case.

Pennsylvania v. West Virginia is a border line case, but it has no application here. Pennsylvania's direct property right was a very large investment in heating appliances from which West Virginia threatened to cut off the only supply of fuel available, leaving such appliances useless. Her sovereign right was her duty to protect the health and comfort of her people in all parts of the state from having withdrawn the single source of the kind of fuel for which their facilities had been adapted. A State is *parens patriae* of the health and comfort of its people.

Furthermore, there was no question of navigable capacity involved. The case properly falls in that class of cases involving invalid state taxes and other burdens on *commodities* of interstate commerce, and not in the class of cases that have to do with the *facilities* of commerce.

The distinction is obvious. For example: It has been repeatedly held that the provision of organic acts, (such as the act admitting the State of Oregon into the Union, the Ordinance of the Northwest Territory and the Wisconsin State Constitution), providing that "all navigable waters shall be common highways and forever free," do not refer to *physical obstructions* but to *political regulations.*

Concerning these provisions this court said, in *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, on page 10:

> "What regulation of commerce does it affect? Does it prohibit physical obstructions and impediments to the navigation of the streams? Or does it prohibit only the imposition of duties for the use of the navigation, and any discrimination denying to citizens of other states the equal right to such use? This question has been before this court, and has been decided in favor of the latter construction."

It was also held in *Withers v. Buckley*, 20 Howard 84, that such a provision did not prevent the legislature of a state "from improving by a canal the navigation of one of" its "navigable rivers and thereby diverting without compensation the flow of water * * *."

The Withers case is cited with approval by this court in the later case of *Shively v. Bowlby*, 152 U. S. 1, on 33.

Moreover, the Supreme Court of Wisconsin, referring to this provision in the Wisconsin State Constitution, announced the same rule, and stated in the case of *In re Southern Wisconsin Power Co.*, 122 N. W. 801, 807:

> "The clause in the Constitution, providing that the navigable waters therein referred to 'shall be common highways and forever free' etc., does not refer to physical obstructions of these waters, but refers to political regulations which would hamper the freedom of commerce."

In the class of cases dealing with restrictions by attempted state political regulation of interstate commerce, the test of jurisdiction is: Did the plaintiff itself suffer from the burden imposed? Was the plaintiff one of the class guaranteed against such burden? (*M. K. & T. Ry. v. Cade*, 233 U. S. 642, 648 and seven cases there cited). The facts found by the court, in *Pennsylvania v. West Virginia*, seemed to bring Pennsylvania well within that rule, and that was sufficient to sustain the jurisdiction.

The West Virginia case, in another aspect, stands directly against the contention for which it is cited by complainants in this branch of the argument, viz.;

In *Ohio Oil Co. v. Indiana*, 177 U. S. 190, and *Walls v. Midland Carbon Co.*, 254 U. S. 300, this court held that the legal right of a state respecting gas in the ground was like its right over wild animals, that is to say, *precisely like its rights in the corpus of waters within its boundaries, a quasi sovereign right in a substance not capable of ownership:* a right and a duty to protect it for the collective benefit of its people. *There was no question of interstate commerce involved.*

But in *Pennsylvania v. West Virginia*, where West Virginia was attempting to vindicate the identical *quasi sovereignty of the same subject matter* by a statute—the same natural gift within its borders—the asserted *quasi* sovereign right *necessarily obtruded itself into a field occupied by the paramount sovereignty of the United States.* It vanished. It was non-existent. Whatever may have been the *quasi* sovereignty of West Virginia in gas, she had no sovereignty in interstate commerce. The latter sovereignty belonged to the United States. Such precisely is out contention here. Whatever may be the sovereignty of complainants over waters within their borders, they have *no* sovereignty over *interstate commerce* and no sovereignty over the navigable capacity of these inland seas.

From the foregoing, it may be seen that the cases cited to support the suit of Wisconsin and sister states bring nothing to their comfort. The only cases on the subject are emphatically against her. The words "*parens patriae*" bring her no help. They mean no more than "sovereignty." Wisconsin cannot be "*parens patriae*" for Canada. She *is* not "*parens patriae*" for citizens of the United States. And, if she sues as "*parens patriae*" she must show dominion. She has no dominion in navigable capacity of interstate waters. As was said in *Louisiana v. Texas*, 176 U. S. 1:

> "Louisiana presents herself in the attitude of *parens patriae*, trustee, guardian, or representative of all her

citizens * *. Inasmuch as the vindication of the freedom of interestate commerce is not committed to the state of Louisiana and that state is not engaged in such commerce, the cause of action must be regarded not as involving any infringement of the powers of the state of Louisiana, or any special injury to her property, but as asserting that the state is entitled to seek relief in this way, because the matters complained of affect her citizens at large. * *"

As we have shown, rights in interstate commerce flow from the sovereignty of the United States only.

"It cannot be considered that a state as *parens patriae may institute judicial proceedings to protect citizens of the United States from the operations of the statutes thereof.*" (*Mass. v. Mellon*, 262 U. S. 447, 485).

"We are of opinion that the words in the Constitution * * * are not to be interpreted as conferring * * jurisdiction in every cause in which the state elects to make itself a party plaintiff * * and seeks not to protect its own property, but only to vindicate the wrongs of some of its people * * *" (*Oklahoma v. Atchison Ry.*, 220 U. S. at 289). A state cannot invoke the original jurisdiction of the court by suit on its behalf where the primary purpose of the suit was to protect its citizens generally * *. (*Oklahoma v. Gulf etc. Ry.*, 220 U. S. 290 at 301.)

These cases should govern this bill. No property right is involved; the sole injury and right asserted are claimed as sovereign rights in navigable capacity of interstate navigable waters; there is no such state sovereignty; there is no wrongful act of the defendant. The bill should be dismissed.

Complainant contends that if this be true *only the United States* could sue for an alleged obstruction to the navigable capacity of an interstate navigable stream, whereas the books are full of suits sustained by individuals.

This is a *non sequitur*. Of course anybody who *has a right* and a *special injury therein threatened or created by a wrongful act* can sue. No individual could sue *in this case* because there has been no injury to any navigator (*U. S. v. Sanitary District of Chicago*, unpublished opinion of Judge Carpenter which appears at pp. 114 to 117 of Appellants Narrative, in *Sanitary District v. U. S.* 266 U. S. 405). But surely the fact that none of Wisconsin's citizens have a cause of action could supply no cause to her. *She* could not sue if they *had* a cause of action and a *fortiori*, she could not sue if they have *none*.

For reasons relating to the dignity of a sovereign, an individual cannot sue a state or the United States without consent. But if there were any injury, any individual could sue the Sanitary District here on the principle that suit against an officer or agency alleged to be acting under a void statute and thus infringing a right of an individual to the latter's injury, gives that individual a standing in court and his suit is not one against a sovereign. Hence the cases (whose name is legion) of such suits by individuals. *The very fact that there have been no such suits in this case is proof of the lack of merit and substance here.* And the usual argument that a state should sue to prevent injury to thousands is inappropriate here, for one injunction by one lone Sicilian fisherman in the lakes would accomplish all that could be done by seven states—or fifty power companies. But neither one nor fifty power companies could maintain a suit as against the interests of navigation. (*U. S. v. Chandler Dunbar Co.*, 229 U. S. 53), unless, perhaps, they could get some state to be their *parens patriae*.

Complainants say that the principle, that, in matters of commerce where the federal interest is imminent and direct, the states may not act at all, has no applicaion here. Our argument depends not on that principle. Nevertheless,

we think it not only applies here, but applies with tremendous impact.

In respect of effective modern navigation, the lake harbors, the canal and the rivers to the gulf are all parts of one artificial system and facility of navigation. Congress has been experimenting with it all. The sanitary situation at Chicago can neither be decreed or legislated out of existence. It is a noisome fact.

By a combination of methods this problem will be solved —partly by a change in the present dilution of sewage, partly by dredging in the rivers below, partly by compensating works in the lakes above, partly by deepening the harbors in the lakes, in remote possibility by turning other waters into the lakes. This is a complex subject. Canada must be consulted and negotiated with. She is being negotiated with.

This is the problem of Congress. Can Congress be forced to solve it piecemeal and to adopt the single solution least beneficent to the general good. It may be inappropriate for Congress now to pass an act. Congress may not desire either to validate or deny the entire diversion until it has determined the Lakes-to-the-Gulf project—until it knows the attitude of Canada—until it has determined the real effect on lake-levels. Does this inaction of Congress give power to a state to coerce the legislative discretion and force action?

As we have shown, Congress *knew every detail of this history from the beginning*. It did not act. It preferred, for the time being, to leave regulation to the department it had created for that purpose rather than to enact an absolute rule of either inhibition or permission. Did the course pursued leave open a method by which the discretion of Congress, the State Department and the War Department can be coerced? We think the rule is as applicable to an artifi-

cial as to a natural waterway in such a case as this, that the non-action of Congress conclusively implies a prohibition of interference with the existing status and, if interference is outside the province of a state by reason of the Constitutional delegation of powers, we think it is equally outside the province of courts by reason of the Constitutional distribution of powers.

There is no theory on which the states complainant should be permitted to maintain this bill.

VI-2.

Sovereign rights of the States complainant in the navigable capacity of these waters have been completely appropriated by the United States to the exclusion of the States complainant, by general acts of Congress assuming exclusive control of navigable waters of the United States.

We have hereinbefore contended that, the Constitution, *ex proprio vigore*, and in the inaction of Congress, inhibits such a suit as this, but if it be held that in such inaction there is a sufficient residual right in the state to maintain this action, then we feel sure that Congress, by general acts, has absorbed that residual right.

Wisconsin v. Duluth, 176 U. S. 1 was concerned with what, for purposes of illustration, we may call a pear-shaped lake harbor, the base of the pear lay toward the lake. One side of the pear was Wisconsin, the other Minnesota, and the stem was a boundary stream between the states. The arc of the base was made by two narrow strips of land projecting from either state and almost meeting. The narrow strait between was near the Wisconsin shore. Current from the river, continuing across the harbor and through the channel, kept the strait scoured out and thus it became the only entrance to the harbor. On the Wisconsin shore near this entrance grew up the harbor of Superior City. On the

opposite shore of the bay was Duluth, situated at the base of the Minnesota segment of the arc. Here came the Northern Pacific Railroad and established a terminus. Duluth needed a harbor. The Federal Government sought, without success, to provide one outside the arc. Duluth became impatient. With very little preliminary she went out one day and cut a channel across the arc close to the Minnesota shore. So expeditiously and effectively was this done that, within the year, the canal was complete. Minnesota had no acts of 1822 or 1827, nor any act of Congress, nor any permit from the Secretary of War, nor any statute from the state.

The channel of the boundary river promptly changed and began to run through the artificial canal. The natural entrance at Superior City began to fill up. Ships began to use the Duluth channel. The government began to dredge. Wisconsin began to sue. For seven years she sued and would not be comforted. Finally she came here.

In the meantime the Federal Government continued the even tenor of its accustomed way in maintaining the artificial system of lake navigation, precisely and with no more nor less definition than we have before us in the present case. It dredged the harbor. It dredged the Superior entrance. It dredged up to, but, at first, not through the Duluth entrance but it dredged at both ends thereof, just as it has dredged up to both ends of (and not through) the Sanitary and Ship canal. The Congressional appropriation of funds was general to the harbor. The engineer officer in charge expended them at his discretion, but he expended them with relation to both entrances. Finally he reported that he wanted to do $8,000 worth of urgent work on one of the piers of the canal and to have a fund of $10,000 available for other repairs. Congress cautiously authorized expenditure of the sum of $15,000 for "the *harbor* at Duluth" (not expressly for the

canal) and in a refinement of caution prescribed "that it shall be upon the express condition that it shall be without prejudice to either party in the suit now pending * * *" language curiously reminiscent of the cautious disclaimers of any responsibility in the present permits.

These facts are in precise parallel with the facts here, but our case is very much stronger. That case was decided in 1877. We have the statutes of 1822, 1827, 1890, 1899, the permits of the Secretary of War and the decree of this court in the federal case. Otherwise we have here the same kind of place in the same artificial system of lake navigation, the same federal co-operation and construction up to both ends of our canal, and, while we have never asked the Federal Government to make any repairs to our piers, we have worked side by side in the same rivers below our canal and in the Chicago river. Wisconsin contended there substantially what she says here: No state can obstruct an interstate stream. She is entitled to her natural gifts unimpaired and regardless of interstate commerce, etc., etc.

However, this court said:

"We proceed to inquire what the general government has done. * * *The whole system of river and lake harbor improvements, whether on the sea coast or on the lakes or the great navigable rivers of the interior, has for years been mainly under the control of that government.* * * The operation of the government in this regard has been *conducted by the Bureau of Engineering* as part of the War Department, to which Congress has confided the execution of its wishes in all these matters. *That department has mapped out, in suitable geographical divisions, the work thus imposed upon it and placed these under the control of officers who are in charge of them.* These are again subdivided so that while the lake system or, at all events, the western lake system, is in the charge of one general superintendent, the separate works which at different places are con-

ducted under him have each another engineering officer who has special charge of these works. *For many years Congress has been in the habit of passing an appropriation bill called 'The River and Harbor Bill,' devoted to works of this class exclusively.* * * The money thus appropriated is expended, as we have said, under the direction of the War Department. *It cannot be necessary to say that when a public work of this character has been inaugurated or adopted by Congress and its management placed under control of its officers,* there exists *no right in any other branch of the government to forbid the work or to prescribe the manner in which it shall be executed.* * * (Note that this remark applies to the whole system of lake improvement as one unit). It had for several years been at work under appropriations by Congress prior to the construction of the canal at Duluth in the effort to deepen the channel at the mouth of the St. Louis river, but, we may infer, with little success beyond preventing it from filling up.

"The *rapid growth of the City of Duluth,* consequent upon its being made the terminus of a railroad, had attracted attention to the necessity of harbor improvement at that point and Congress had made appropriations for a breakwater which had been partially constructed outside of Minnesota point in the main water of the lake (that is far away from the Duluth harbor) but this had proved a failure, and it was seen that no safe harbor for the vast commerce which was expected to be created at that place by the Northern Pacific Railroad could be secured in that mode. The City of Duluth and the Railroad Company, impatient of relief from Congress, inaugurated, therefore, in 1871 the system of improving the inner harbor. * * The canal was completed sufficiently for use in that year and the dredging of the harbor commenced (by Duluth).

"The matter was in this condition when Congress, by the River and Harbor Bill approved March 3, 1873, appropriated, 'for the purpose of dredging out the Bay of Superior from the natural entrance to the docks of

Superior and Duluth and preserving both entrances from the lake thereto, $100,000' (this dredging and improvement was up to, but not including, the canal)." There was but one entrance into that bay from the lake until the canal was made. There were no docks at Duluth but those made by the Railroad Company and the City in the inner harbor and the upper end of that bay.

"We see, then, at once, that Congress, recognizing what had been done by private enterprise at Duluth, determined to place that harbor and that canal under the same protection and to provide for them in the same appropriation which covered the entrance and harbor at Superior City. Hence one hundred thousand dollars was appropriated as one item for both entrances and for both improvements to be administered by the same officers as their judgment might dictate." (This refers to money spent in the harbor not in the canals. The court continued speaking of the cautious way in which Congress had worded the statute).

"* * It was unnecessary * * *. The Congress of the United States had themselves before this adopted, recognized and taken charge of this work which had placed it on precisely the same ground and provided for in the same paragraph and out of the same aggregate sum of money that it did the work at the original entrance, as it is aptly called, at the mouth of the river. * * The War Department had accepted charge of the work, had expended appropriations made and had now for several years made the same regular estimates for this work that it did for all others under its control and management, * * and though the State of Wisconsin had brought her suit in this court to abate the work as a nuisance and Congress was made aware of the fact, it still, in 1876, made the usual appropriation and the War Department still had the work in charge, and *Congress cautiously said that this shall prejudice no one in the suit, but we shall go on, notwithstanding, and continue this system of improvement.*

"We do not feel called upon to make an argument

to prove that these statutes of the Congress of the United States and these acts of the executive department in carrying those statutes into effect constitute an adoption of the canal and harbor improvement started by the City of Duluth and taking exclusive charge and control of it; that they amount to the declaration of the federal government that we were interposing and asserting our power.

"We take upon ourselves the burden of this improvement, which properly belongs to us, and that wherever this work for the public good is in our hands and subject to our control. If the merest recital of these acts of Congress and of the War Department under them do not establish that proposition, we can have little hope of making it plain by elaborate argument. * *

"While this court has maintained, in many cases, the right of the states to authorize structures in and over the navigable waters of the states which may either impede or improve their navigation in the absence of any action of the general government in the same matter, the doctrine has been laid down with unvarying uniformity *that when Congress has, by any expression of its will, occupied the field, that action was conclusive of any right to the contrary asserted under state authority.* * * " (that is, in this case, any right of a state to sue.)" If then Congress, in the exercise of a lawful authority, has adopted and is carrying out a *system of harbor improvements at Duluth*, this court can have no lawful authority to forbid the work. If that body sees fit to provide a way by which the great commerce of the lakes and the countries west of them, even to Asia, shall be securely accommodated in the harbor of Duluth by the short canal of three or four hundred feet, can this court decree that it must forever pursue the old channel by the natural outlet over water too shallow for large vessels, unsafe for small ones and by a longer and much more tedious route? *While the engineering officers of the government are, under au-*

thority of Congress, doing all they can to make this canal useful to commerce and to keep it in good condition, this court can* owe no duty to a state *which requires it to order the City of Duluth to destroy it."

The bill was dismissed. We believe the case controls the present case at every point and stands as a direct authority on the principles involved here. It decided, in effect, that the relief sought must invade the Constitutional function of another branch of the government and that a *state has no cause of action and a court no power* to interfere with the Federal artificial navigation system in the Great Lakes even where boundary streams are diverted, and littoral waters obstructed. This is the only suit we have found where what was sought was to coerce the War Department's discretion to balance convenience in regulating commerce—where commerce stands on both sides of the suit. It and *South Carolina v. Georgia*, 93 U. S. 4 are the only cases we could find where a state attempted to base a suit on its right in navigable capacity of interstate waters. Both failed.

Complainants urge that *Wisconsin v. Duluth* decided nothing as to jurisdiction. There is nothing in the report to indicate a demurrer. That is immaterial. If the relief sought is such as a court of equity ought not to grant, the bill is demurrable. The decision goes to jurisdiction. Dismissal on demurrer is within the discretion of the court, but in the instant case there seems to be *every* reason why the bill should be dismissed and *none* why it should be entertained.

We think that reference to the whole body of the River and Harbor Acts for the last sixty years is sufficient to demonstrate that this canal is but part of one navigation system which for all the purposes of this suit may be regarded *as wholly artificial and wholly created by the United States.* The entire argument about natural gifts, restoration of things to a state of nature, and absolute rights fails. There can be no more quasi sovereign rights in such a state of affairs than there can in a first class battleship. These states have no more right to enjoin this diversion permitted

by the Secretary of War than they would have to enjoin his moving a regiment of regulars out of their domain. Even if such a right remains, where there is *non-action* by Congress, it certainly does not remain after such comprehensive *action* as we have here and this was held to be so in *Wisconsin v. Duluth*, even in the absence of the positive general enactments of 1890 and 1899.

But these latter statutes certainly conclude the argument. It would scarcely seem necessary to expand the showing and citation in pages 33 and 34 of our first brief that the System of Great Lakes and Lakes-to-Gulf navigation is one requiring unity of control, that by the acts of 1890 and 1899, Congress assumed that control.

Complainants' brief brings absolutely nothing in the way of authority against the pronouncements in the cited cases except to deny that the United States has any authority to *benefit* navigation anywhere if the same act would *impair* it anywhere. This is indeed a singular contention. Every bridge case presents a balance of convenience as was clearly shown in the *Passaic Bridge Cases*, 3 Wall. 782. In *South Carolina v. Georgia*, 93 U. S. 4, the act of the government complained of was throwing a navigable channel away from the Carolina side of an island to the Georgia side. This court dismissed the South Carolina bill. In *Wisconsin v. Duluth*, as we have just seen, the complaint was that an interstate boundary stream had been diverted and a natural channel obstructed.

While (because of the 5th Amendment) the power to regulate commerce is not the power to destroy *private property rights without compensation*, we have seen, in many of the cases cited and especially cases of the type of *Gibson v. the United States*, 166 U. S. 269, that the 5th Amendment is the *only* limit to its power to destroy. Also that even this limitation does not prevent destruction of riparian and other incorporeal rights—such as rights in navigable capacity

(*Union Bridge Co. v. U. S.*, 204 U. S. 364; *Northern Transportation Co. v. Chicago*, 99 U. S. 635; *Scranton v. Wheeler*, 179 U. S. 141; *U. S. v. Chandler-Dunbar Co.*, 229 U. S. 53). It is a power plenary—fully as wide as the situations with which it has to deal. While doubtless this court would strike down something done in the name of commerce that had no appropriate relation to commerce, the second *Wheeling Bridge Case*, 18 How. 421, demonstrates that it would never substitute for the determination of Congress as to what is or is not an obstruction to commerce, a contrary determination of its own. Talk of a fear of Congress "syphoning" away the Great Lakes may seriously begin when the depths of the harbors named in this suit is reduced from the 18 to 20 feet depth which Congress has provided in them to the 2 or 3 feet depth, with which Congress found them in their "*natural navigable capacity.*" The Great Lakes are still safe and in competent hands.

Complainants do not agree with our construction of the Boundary Waters Treaty. We think our view has been fully justified herein (pp. 45 to 51 *supra*). The effect of such a treaty to abate the quasi-sovereignty of a state wherever the two come into conflict is discussed in *Missouri vs. Holland*, 252 U. S. 416, where the question was the effect of the migratory bird treaty with Canada on the quasi-sovereign rights of a state in things *furae naturae*. There the court said:

> "We do not mean to imply that there are no qualifications to the treaty-making power but that must be ascertained in a different way. * * The treaty in question does not contravene any prohibitory words to be found in the constitution. * * The state, as we have intimated, founds its claim of exclusive authority upon an assertion of title to migratory birds * * but it does not follow that its authority is exclusive of paramount power. *To put the claim of the state upon title is to lean upon a slender reed.* Wild birds are not in pos-

session of anyone. * * *But for the treaty the state would be free to regulate this subject itself.* * * No doubt the great body of private relations usually follow within the control of the state but a treaty may override its powers. * * This proposition * * was recognized as early as *Hopkirk v. Bell*, 3 Cranch 454 (citing many old cases). Here a national interest of very nearly the first magnitude is involved. It can be *protected* by national action in concert with that of *another power*. The subject matter is only transitorily within the state and has no permanent habitat therein. * * It is not sufficient to rely upon the states. The reliance is vain and were it otherwise the question is whether the United States is forbidden to act. We are of the opinion that the treaty and statute must be upheld."

Quasi sovereign rights in water are in precisely the same category as similar rights in animals *ferae naturae*.

We do not say (as complainants seem to think) that the United States restricted, by the treaty, its control over this diversion. Our contention is that a federal compact with a foreign power in respect of these waters is one more step in their recession from any *quasi* sovereignty of littoral states —one more evidence that states, either by suit or otherwise, have no right to interfere.

We believe that, quite apart from particular statutes and permits of the Federal government, assuming control of the navigable capacity of these waters, sovereignty over that capacity was lodged exclusively in the Federal government by the constitution alone, and if not, that it was completely absorbed by the general statutes and treaty mentioned to the complete exclusion of such state sovereignty as would support this suit.

VI-3.

The right of the states complainant to maintain this suit has been entirely obliterated by particular legislative, executive and judicial acts of the United States (assuming complete

control of the very acts complained of and of every matter or thing affected by them.

Our contention may be epitomized thus: Congress authorized a canal and diversion of water from Lake Michigan by the acts of 1818, 1822 and 1827. The purpose of this authorization was to create a highway of commerce.

Neither the precise size nor location, nor amount of diversion were specified and hence the rule of reasonableness governed; nothing contrary to the foregoing conclusions was determined in Sanitary District v. U. S. That case merely held that such a history did not prevent control of the amount of diversion by the Secretary. The canal was expanded for navigation purposes until 1889. At that time no act of Congress was required to construct an obstruction in intra-state navigable waters. (See page 16 *supra*). No one had foreseen any effect on lake levels. (P. 18 *supra*).

The projects of Congress included a deep waterway along the canal route (p. 20 *supra*). Illinois hoped to hasten this consummation. Also the pollution of the lake, the Chicago river and the canal had themselves become a problem of navigation. Moved by both incentives, the canal was built. No authority was ever required *to build it* except as incidental construction in the Chicago river occupied water courses. Whatever authorization Congress required was secured in the form of permits from the Secretary of War.

By the time the earliest diversion through it was possible, the sanitary situation had become a compelling consideration of interstate commerce. Not until then had any army engineer ever suggested an effect on lake levels. (P. 18 *supra*).

The Illinois legislature memorialized Congress when it began construction, and every act done by Illinois was reported annually to Congress in meticulous detail (pages 16 to 34

supra). The attitude of the government was consistently one of encouragement, cooperation and invitation.

The canal was a combined project for flotation and sanitation. Both purposes bore a reasonable relation to navigation. The sanitary arrangements for a city of millions are not constructed in a year. When the first permit was presented to the Secretary of War, his action thereon was not merely an exercise of judgment on the *best* method of regulating navigation. From the sanitary aspect of navigation the method he accepted *the only method available*. From the flotation aspect it was a proper method. Both motives in good faith controlled the construction of the canal and the action of the Secretary. From the flotation aspect alone the Secretary would have been remiss in his trust if, then or at any time since, he had abated the canal. At least three special provisions of acts of Congress had called upon him for surveys of a riverway project which by necessary intendment contemplated the canal and diversion through it as within the immediate projects of Congress. (pp. 16 to 34, 120 *supra*).

The Lakes-to-the-Gulf Waterway is a fundamental and real requirement of navigation. The amount of water from Lake Michigan it will finally require when all is done that can be done has not yet been finally determined by Congress. The amount of water necessary to avoid paralysis of commerce by converting Lake Michigan into a cesspool is now passing through the canal. It is being diverted by a permit of the Secretary of War, acting under authority of the Act of 1899. The Secretary's authority to grant this permit has been confirmed by this court in the very circumstances here presented. Under the terms of that permit the federal government is now in direct regulatory control of all acts complained of here.

Assuming all federal acts as above recited to be valid, what remains as a basis for this suit? What right has a state? What is the wrongful act of defendants?

The suit reduces to a complaint that a regulation of commerce by the federal government is not a wise regulation and to a proceeding to coerce the discretion of the legislative and administrative branches of the government in acting on a matter wholly within their control. As we have shown (pp. 52 to 66 *supra*) ***such a suit can have no standing here. No matter who the party and no matter what his injury or inherent right to sue.***

The Act of 1899, the Secretary's permit under it, and the decree of this court validating the Secretary's power are all patent on the face of the bill. Without any other argument or any other showing than this, this bill ought to be dismissed.

VII.

Every act complained of was done by or under valid and proper authority of the United States.

Complainant contends that Congress has no power to regulate navigation in such manner as will anywhere impair it, but only to regulate it in such manner as will everywhere benefit it. We think we have fully answered this novel contention elsewhere (p. 108).

But complainant says: "If the power is valid, Congress has never, by a statute, exercised it to authorize any abstraction of waters from the lakes; that Congress could not authorize water to be diverted beyond the lake watershed." We have answered the first suggestion at page 58 and the second at page 86. Complainants' next contention is that, "Congress or the Secretary authorized any diversion in excess of what is required for navigation, the authorization transcended the power. What was authorized was not excessive (pages 39-40; 112). Complainants' contention of excess proceeds on a norm of what is necessary for navigation which complainants construct for their own purposes.

It is for Congress and the Secretary to decide what is necessary and not for complainant or the court. When the federal government sues as in *Sanitary District v. U. S.*, it brings its own valid regulation and asks the court to vindicate that. When, thereafter a state sues, as here, it asks the court to upset the legislative regulation, substitute a judicial one and vindicate it by a decree.

But complainants say a former Secretary and some of his officers once said that a less amount than was permitted is really necessary. The final act of the Secretary—his permit—is the evidence of his determination of what is necessary. But complainant misconstrues the effect of the documents he quotes. He is speaking of that which, under *one* plan of Lakes-to-the-Gulf waterway, has been tentatively considered, in a few opinions and relating to one project, as necessary *for the flotation of ships.*

Sanitation of navigation is, in this case, necessary for navigation, and complainants' whole brief proceeds on the error of denying this obvious fact. A few of the many divergent opinions of experts on the kind of project and the amount of diversion necessary, are related in our argument on the facts. Let complainants ask themselves what would happen to navigation at Chicago, in the lake as well as in the canal, if the decree it seeks were to issue tomorrow. The present diversion is not only a benefit to navigation, it is a fundamental necessity thereto and it is justified as well on sanitation as on the flotation of commerce.

But complainant says the Act of 1899 never delegated power to the Secretary of War to authorize any obstruction to the navigable waters of the United States. To sustain this he cites a single case in the Federal Reporter, (*Hubbard v. Fort*, 188 Fed. 987) and incorrectly says that the statute has not been construed by this court.

In *Sanitary District v. U. S.* this court after quoting a portion of Section 10, (the section in question), said:

> *"This statute repeatedly has been held to be constitutional in respect of the power given to the Secretary*

of War. (*Louisville Bridge Co. v. United States*, 242 U. S. 409, 424, 37 S. Ct. 158, 61 L. Ed. 395.) It is a broad expression of policy in unmistakable terms, advancing upon an earlier Act of September 19, 1890, c. 907, § 10, 26 Stat. 426, 454 (Comp. St. § 9910a), which forbade obstruction to navigable capacity 'not authorized by law,' and which had been held satisfied with regard to a boom across a river by authority from a state. (*United States v. Bellingham Bay Boom Co.*, 176 U. S. 211, 20 S. Ct., 343, 44 L. Ed. 437). *There is neither reason nor opportunity for a construction that would not cover the present case.* As now applied it concerns a change in the condition of the Lakes and the Chicago river, admitted to be navigable, and, if that be necessary, an obstruction to their navigable capacity, (*United States v. Rio Grande Dam & Irrigation Co.*, 174 U. S. 690, 19 S. Ct. 770, 43 L. Ed. 1136), without regard to remote questions of policy. It is applied prospectively to the water henceforth to be withdrawn. This *withdrawal is prohibited by Congress*, except so far as it may be authorized by the Secretary of War."

Hubbard v. Fort, 188 Fed. 987, merely held what has also been held here in *Cummings v. Chicago*, 188 U. S. 410, that a permit to a private individual under the Act of 1899 did not obviate the necessity for *also* procuring state authority for an act performed *within the domain of the state and especially against state protest.* In that case the permitee was a trespasser seeking to lay water mains on state lands in the bed of the Kill von Kull in New Jersey. He sought to enjoin the state officers from interfering with him on the ground that the Secretary's permit constituted Federal authorization. The Federal district court went further than *Cummings v. Chicago* and said that the Act of 1899 required an act of Congress to authorize obstructions in navigable waters. The ground of the decision did not require such an interpretation of the statute. It is an interpretation contrary to a course of federal administration of 27 years standing, to the decision of this court in the Sanitary

District case and to the intendment of decisions in many other cases cited herein.

An interpretation consistent with the administrative course of conduct was enunciated in *Maine Water Co. v. Knickerbocker*, 99 Maine 473. This interpretation of the statute was cited with approval (if not, by necessary intendment adopted), by the court in *Southern Pacific Co. v. Olympian Dredging Co.*, 260 U. S. 205, 210. It is also consistent with the opinion of the Attorney General of the United States (Appendix III, Defendants' first brief) and also consistent with reason, since the interpretation contended for by complainants would paralyze the facilities of navigation. As was said in the case of *Maine Water Co. v. Knickerbocker, supra*:

> "We cannot help remarking, in passing, that if the defendant's interpretation of the Act of 1899 is the correct one, it leads to a rather surprising condition. It would seem that not a wharf or pier, outside established harbor lines, or where no harbor lines have been established, can now be built in the navigable waters of the United States, not a dolphin can be anchored for mooring vessels, not a boom can be stretched, nor a weir erected for any purpose, until hereafter authorized by Act of Congress. We think it cannot be assumed that Congress intended any such result unless the Act in question is so expressed as not to admit of any other reasonable interpretation."

The effect of the first sentence of Section 10 of the 1899 Act containing the prohibition against obstructions "not affirmatively authorized by Congress," was particularly important. The Court, with reference to this, further said:

> "The general prohibition in section 10 is brought with only one substantial change from section 10 of the Act of 1890. The Act of 1890 said 'not affirmatively authorized by law,' which was held in *U. S. v. Bellingham Bay Boom Co.*, 176 U. S. 211, to mean not only by a law of Congress, but even by a law of the state in which the river is situated. The Act of 1899 says 'not affirmatively authorized by Congress.' Following this

general prohibition, and immediately connected with it, is the remainder of section 7 of the Act of 1890, which relates to wharves and other structures, which would include this pipe line. The only important change is this. The Act of 1890 made unlawful the erection of such structures without the permission of the Secretary of War in the waters of the United States, outside established harbor lines, or where no harbor lines have been established, in such manner as shall obstruct or impair navigation. The Act of 1899 makes unlawful such erections, except they are built on plans recommended by the Chief of Engineers and authorized by the Secretary of War.

"Although in the arrangements of parts, the general prohibition now is found at the beginning of a section which also relates to the specific regulation of the building of wharves and so forth, instead of being in a section by itself, as before, we are not persuaded that Congress, by changing its position, intended to change its effect. It is still general as before. And though general in terms before, we think, as we have stated, that structures impliedly authorized by Congress in the preceding sections were not prohibited. And in its new position we think that the general prohibition is likewise qualified by the sentences which follow. It cannot make any substantial difference whether the general prohibition is at the beginning of a section or at the end, or in a section by itself, if it clearly appears from the language used and from the context, all taken together, that the legislative intention was that the general prohibition was to be regarded as subject to specified qualifications. * * *

"* * * The implication seems clear to us that such structures, if built according to plans recommended and authorized as provided in the section, are authorized by Congress — that they are affirmatively authorized, — though the affirmative authority arises by implication, —and that they are lawful without any further action by Congress."

But complainant contends that, even though the statute of 1899 intended that an obstruction could be authorized by the Secretary without an act of Congress, such act would not be so authorized as against complainants' protest.

To establish this, complainants point out that the printed form heading of the permit states that it grants no property rights or exclusive privileges, does not authorize any infringement of local laws, "nor does it obviate the necessity of *state assent to the work* authorized. IT MERELY EXPRESSES THE ASSENT OF THE FEDERAL GOVERNMENT SO FAR AS CONCERNS THE PUBLIC RIGHTS OF NAVIGATION."

Of course the intendment of these limitations is perfectly obvious. The issuing of such permits is a routine departmental matter. When the federal government directly does work in a navigable stream (as we have seen in many cases of the type of *Gibson v U. S.*, 166 U. S. 269, and *U. S. v. Chandler-Dunbar Co.*, 229 U. S. 53) all private rights go down before it without compensation. Naturally the federal government does not release this great and possibly destructive power without some restrictions.

The four cases quoted to support the principal contention go no further than to vindicate this obvious principle. The first three, *Hubbard v. Fort*, 188 Federal 987; *Cobb v. Commissioners*, 202 Ill. 427; *Wilson v. Hudson Water Co.*, 76 N. J. Eq. 543, were cases of injury to property by the erection of structures thereon in defiance of the right of the owner, and the court held, in effect, that the permit did not authorize this without consent of the owner. The fourth case quoted from (*Attorney General v. Bay Boom, etc., Co.*, 172 Wis. 363), was an injunction by the state to prevent construction of a dyke *within a state without that state's assent.* The state court held that the permit on its face did

not authorize this. It was exactly the case of *Cummins v. Chicago.*

These cases have no bearing on the present case. The permit says: "You must have state assent *for the work* authorized." We have such assent. The permit says: "This permit does not grant any property rights in other peoples property." No such property is involved here. "You must not invade *private rights* or federal or state laws, but, as to the *Public Right of Navigation*, your project is authorized by the federal government."

Only the *Public Right of Navigation* is involved in this complaint. It goes to an alleged impairment of the navigable capacity of the Great Lakes. As we have shown, that is a matter not within the dominion of any state and not subject to state laws. Complete control of it is in the federal government. Under that complete control, the act complained of has been authorized and the doctrine and the cases offered on this point are all quite outside of the issues involved.

There is another element here which is neither present in any of the cases cited by complainant, nor in the usual case where such permits are reviewed. In the usual case, the condition complained of is a crass and unrelieved obstruction to navigation—a barrier across or a butte within a highway of navigation—a physical structure, for some private gain, built on the property of others and opposed to the interest of navigation. On one side stands the public interest, on the other a private interest adversely affecting it.

The present *case is clear out of that category.* Commerce stands on *both sides* of this controversy. Only in a technical sense is there any obstruction at all. A relatively small amount of water from one stream amply navigable, even after the diversion, is turned into another stream to

make the latter navigable at all, and to make navigation free of pestilence in both. Every substantial allegation of the bill is based on a claimed absolute right to say that not one drop of water may be so used, *no matter what the authority*. Most cases involve litigation of private rights, in matters of merely local and particular interest. This case goes to national fundamentals in every bearing and involves treasure beyond human comprehension.

The present case must be considered on its own facts and circumstances and be governed by a rule apposite to the great issues involved. It must not be considered on other and inapposite circumstances, nor governed by rules appropriate only to a different and opposing state of facts and principles.

West Chicago Railway v. Chicago, 201 U. S. 506, we believe concludes all questions involved in this branch of the case.

The River and Harbor Act of 1899 contained the following provision: "Improving Chicago river in Illinois: *Survey and estimate* of cost for a channel 21 feet deep * * exclusive of cost of removing or constructing bridges or piers or lowering channels* * ."

Without any authority whatever from the Secretary or Congress, the state of Illinois anticipated what Congress expressed as an intention by those words, and began dredging in the Chicago river, altering its capacity, and interfering with riparian and property rights therein generally. The Railway Company owned the bed of the stream, the bank on either side and a tunnel underneath it. The state ordered the Railway Company to lower the tunnel or remove it. The company resisted. A mandamus suit followed. Through varous vicissitudes the case came here.

The River and Harbor Act of 1888 (the year preceding

the Illinois Canal Act) contained the following language: "Improving Illinois river, Illinois: Continuing improvement, $200,000.00. And for the purpose of securing a continuous navigable waterway between Lake Michigan and the Mississippi river, having capacity and facilities adequate for the passage of the largest Mississippi river steamboats, and of naval vessels suitable for defense in time of war, the Secretary of War is authorized and directed to cause to be made proper surveys, plans and estimates for a channel improvement * * * in the beds of the Illinois and Des Plaines rivers from LaSalle to Lockport, so as *to provide a navigable waterway not less than* 160 *feet wide and not less than* 14 *feet deep*, and to have surveyed and located a channel from Lockport to Lake Michigan, * * ." (Lockport is the southern terminus of the present canal).

Illinois anticipated what Congress expressed as an intention by those words and began constructing a canal from Lockport to Lake Michigan 160 feet wide and 14 feet deep.

Returning now to the West Chicago Railway case, the contention of the railway was that its property could not be taken without compensation, that the Act of 1899 forbade any obstructions or alterations in the navigable waters unless affirmatively authorized by Congress or permitted by the Secretary of War, and that the state had no such permit and no authority at all from Congress. The court held:

> "* * *For the purpose of obeying the act of Congress and in order to obtain a free and unobstructed navigation of the Chicago river* for the benefit of commerce, interstate and domestic, the City Council of Chicago * * passed the following ordinance: (Here follows the ordinance requiring the railroad to lower or remove its tunnel.) * * *Great stress is placed by the railroad on the fact that it is the owner in fee of the bed of the river* at the point where the tunnel was constructed * *. It is not vital to the present discussion; for it was ad-

judged by the state court *in harmony with the settled doctrines* * * that the 'title to land under a navigable river is not the same as the title to the shore lands * * the owner of the soil under the bed of such a stream can only use and enjoy it in as far as is consistent with the public right * *. In addition to these considerations, we may suggest the important one, that the rights of the company, as the owner of the fee of the land on either side of the river' (that is, *riparian rights*) * * 'were subject to the paramount right of navigation * *.' (Citing many of the cases cited herein.)

"The railroad company contends that the city had no power to require or authorize any changes in the bed of the river *without the approval of the Secretary of War.*" (Citing River and Harbor Act of 1899, Section 10). "* * The same act contains directions for improvement of the Chicago river. Concerning all the provisions together, we think it clear that when Congress declared in the River and Harbor Act of 1899 under the heading of *'Improving the Chicago River in Illinois,'* that all the work of removing and reconstructing the bridges and piers and lowering the tunnels * * * should be done by the city without expense to the United States, *it meant to give the assent of the United States to any work done by the city toward accomplishing the end which the government had in view.* The state court properly said that the city had power under its charter to deepen the channel and, as a preliminary to doing so, to require this tunnel to be lowered or removed, and the *act of Congress permits it to proceed so far as the lowering of the tunnel is concerned* * * *."

Besides the River and Harbor Act of 1888, quoted *supra*, the River and Harbor Acts of 1899, 1900 and 1902, contain practically the same kind of provisions with reference to the Illinois and Des Plaines waterway. It is to be noted that by the Act of 1899 in the Chicago Street Railway case, Congress merely called *for estimates* and *stated the depth* of the improvement project. It is also to be noted that it

did the same thing in the act of 1888, and also that a 14 feet waterway project in the surveys cited *supra* called for a diversion of in the neighborhood of 10,000 c. s. f.

The West Chicago Railway case construed the words of the 1899 act as constituting *sufficient Congressional* authority (even in the absence of a permit under Section 10 and the express prohibition by Section 10 of action without a permit) to authorize the state to anticipate the intention of Congress and to confiscate riparian and public rights of owners along the shores of the waters being improved.

Complainants' contention is that even under a permit from the Secretary, such rights could not be interfered with, that they are property, etc. etc. This Street Railway case holds that, even in the face of the inhibition of the statute of 1899 against altering the capacity of a stream, and even in the absence of a Secretarial permit, such expressions of the intention of Congress are amply sufficient to establish the *Congressional authority* which complainants say is here lacking—at least as against such *incorporeal private rights* as are *riparian rights* or as against such *purely public rights* as are *rights of navigation.*

In other words, *this Court held that such expressions of the intent of Congress are a sufficiently affirmative authorization by Congress to satisfy the requirements of Section* 10 *of the Act of* 1899.

The delegation of power to the Secretary under the act of 1899 has repeatedly been held valid—even to the extent of effecting the repeal of an act of Congress. (*Louisville Bridge Co. v. U. S.*, 242 U. S. 409. See *Union Bridge Co. v. U. S.*, 204 U. S. 364, where the subject is exhaustively reviewed.)

Complainant contends that, even if Congress could stop up a stream it could not delegate that authority to the War

Department. It has delegated such power to an administrative Board—the California Debris Commission and the Courts have held the delegation valid in *U. S. v. North Bloomfield Co.*, 81 Fed. 343, where the constitutionality of the delegation was attacked, the court said:

> "The absolute power and control of Congress over the navigable waters of the United States in the interest of commerce with foreign nations and among the several states, and *its right to declare what may or may not constitute obstructions thereto, is thoroughly settled.* (*Miller v. Mayor, etc.* 109 U. S. 385, 3 Sup. Ct. 228; *Cardwell v. Bridge Co.*, 113 U. S. 205, 5 Sup. Ct. 423; *Escanaba & L. M. Transp. Co. v. City of Chicago*, 107 U. S. 678, 2 Sup. Ct. 185; *South Carolina v. Georgia*, 93 U. S. 4; *Gilman v. Philadelphia*, 3 Wall. 713.)"

The case of *United States v. North Bloomfield Gravel-Min. Co.* was decided subsequent to the case of *Woodruff v. North Bloomfield Gravel-Min. Co.*, 18 Fed. 753, relied upon by complainants at page 85 of their brief.

The California Débris Commission Act gave to the Commission power to grant permits for hydraulic mining and to determine the effect of such operations upon the navigability of the river systems involved.

In the latter case of *North Bloomfield Gravel-Min. Co. v. U. S.*, 88 Fed. 664, a suit was brought by the United States to restrain the defendant from mining, by hydraulic process, until it had complied with the provisions of said Act. In that case also it was held that the delegation of power to the Commission was valid and the court said on page 674:

> "The power of Congress to pass the act in question, mandatory in its requirements, as we construe it, notwithstanding the array of authorities cited by appellant, cannot, in our opinion, at this late day, be judicially questioned."

The navigable capacity of the Great Lakes, including their levels and the Sanitary and Ship Canal, is a subject over which Congress has taken such complete control as to abolish the right of any State to sue:

First: Because no state has any residual sovereignty in the subject matter and no sovereign right to vindicate Interstate Commerce.

Second: Because the complete absorbtion of the field by Congress by the whole series of River and Harbor Acts, expresses its will that there be no interference other than its own even by the Court. See Wisconsin vs. Duluth (brief, p. 104).

Third: Especially as to this canal and this diversion, Congress has expressed its wish for non interference by any agency in any way:

By the act of 1818, it attached the canal site to Illinois and invited Illinois to make it a waterway of commerce (page 3). By the act of 1822, it authorized a canal to connect the Lake with the Mississippi and by the act of 1827 it gave additional authority for the canal and diversion of water from Lake Michigan and aided the state in building the canal (page 5). By continuous construction in the Chicago and Illinois Rivers in connection with the canal and both before and after Illinois had deepened the cut to waterlevel, it adopted the cut and diversion as part of the national system of inland navigation (pages 13 and 20 to 33). By the Act of 1888, projecting and estimating a fourteen foot waterway and an artificial channel 160 feet wide by 14 feet deep, from Lockport to Lake Michigan, it assented to the work of Illinois in providing such waterway (pages 15, 20, 120 and West Chicago Ry. v. Chicago, 201 U. S. 506 at page 120, brief). By subsequent similar Acts it expressed a continuous purpose to utilize the reconstructed canal as a highway of commerce; for example:—Act of 1899 (page 27), Act of 1900 (page 28), Act of 1902 (page 30). By Act of 1904 (33 Stat. at L 589) Congress

authorized Illinois to remove the crest from two federal dams in the Illinois river in order to permit commerce to avoid locks and float over the dams, thus utilizing for Interstate Commerce the increased diversion and indicating the intent of Congress to regard the waterway as a highway of such Commerce.

Whenever there has been any danger of interference with the canal or diversion by any power other than itself Congress has affirmatively expressed a "hands off" policy that is unmistakable. (Niagara Falls Act of 1906, 34 Stat. at L 626. Boundary Waters Treaty of 1909. See pages 48 to 56 of the brief).

In addition to all these special acts, the general acts of 1890 and 1899 and the permits of the Secretary of War thereunder, especially considering the manner of administration thereunder, constitutes a state of affairs in which it must be said that the Federal government is itself regulating and administering this subject (page 112). See Corrigan Transportation Co. v. Sanitary District 137 Federal 851 C C A. where the Court said "* * * The absolute sovereign * * * may alter the courses and currents of rivers or may dam them or fill them up and neither alien, nor subject traveler, nor navigator may complain. **No one can claim a vested right to have the United States interfere with Illinois nor can a cause of action arise from want of interference."**

By suit in this court the Federal government expressed its wish as to the regulation of this diversion and the Court there remarked that the United States does not wish to have the Canal interfered with as is demanded here. The Federal Government is the paramount and exclusive power, and, since such is its wish, then this bill should be dismissed on this motion both because these states have no right to interefere and because the court has no right to decree interference.

The power of Congress is plenary. The act of 1899 is Constitutional. And finally, everything that has been done by all authority is appropriate and necessary to the security and conservation of commerce and navigation.

CONCLUSION

This bill should be dismissed because:

(1) It is a suit in the name of states and navigation but in the interest of individuals and, as we believe, of hydro-electric power.

(2) It is in no just sense a suit between states. It is a controversy between economic areas, one of which crosses an international boundary. Its bearings are all political and its determination is peculiarly a function of Congress and not of this Court.

(3) It addresses a fundamental and intricate national problem, capable of many solutions which would be beneficial to the general good and seeks to restrict its determination to a single solution, inimical to the general good and beneficial to a single economic area and particular private interests.

(4) It is an attempt to coerce the discretion of the legislative and executive departments of government in a matter committed exclusively to their care, and to embarrass and control the negotiations of government with a foreign state.

(5) Solution of the problem presented involves continuous administrations and relations with a foreign nation. As between states, it requires co-operation, composition and adjustment. Such solution is impossible in the judicial field of absolute rights, instant determination and irrevocable decree—in a word, this is a problem which is political, legislative and administrative and not judicial in its nature.

(6) The bill fails in every juridical requirement. It shows no right, no wrongful act, no injury. It is brought by the wrong parties complainant. It fails to join indispensable

parties. The controversy is not presented in a manner appropriate to judicial cognizance. The complaint properly lies in the Constitutional field of other branches of the federal government. The relief prayed for is inappropriate to the functions and facilities of the court, outside its jurisdiction, and has incidental bearings repugnant to its purpose.

(7) The decree of the court in Sanitary District v. United States and the permit of the Secretary of War issued in compliance therewith (both patent on the face of the bill), are a complete and conclusive answer to the complaint.

The bill is inappropriate to the subject matter of the suit, to the jurisdiction of the court and to the nature of the questions involved, and should now be dismissed without further proceedings.

OSCAR E. CARLSTROM,
Attorney-General of Illinois.

JOHN T. KENWORTHY, Rock Island, Illinois,

CYRUS E. DIETZ, Moline, Illinois,
Solicitors for Illinois.

HUGH S. JOHNSON, Moline, Illinois,
Of Counsel.

O.T. 1930 ORIGINAL NOS. 6, 10 & 11,

FILE COPY

IN THE

Supreme Court of the United States

October Term, 1927

No. 11 ORIGINAL

State of Wisconsin, State of Minnesota, State of Ohio, and State of Pennsylvania, Complainants, vs. State of Illinois and Sanitary District of Chicago, Defendants. State of Missouri, State of Kentucky, State of Tennessee, State of Louisiana, State of Mississippi, and State of Arkansas, Intervening Defendants.	No. 7, Original
State of Michigan, Complainant, vs. State of Illinois and Sanitary District of Chicago, Defendants.	No. 11, Original
State of New York, Complainant, vs. State of Illinois and Sanitary District of Chicago, Defendants.	No. 12, Original

MACLAY HOYNE,
JAMES M. BECK,
EDMUND D. ADCOCK,
GEORGE F. BARRETT,
Counsel for respondents.

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And now, to-wit, January 3, 1928, the Sanitary District, one of the above respondents, by its counsel, Maclay Hoyne, James M. Beck, Edmund D. Adcock and George F. Barrett, appears and respectfully represents to the Court that the time for filing exceptions to the Special Master's report has now expired and that exceptions

have been filed in behalf of the complainants and that no exceptions have been filed by the respondents.

Counsel for the Sanitary District respectfully suggest that it is to the interests of both the complaining states and the responding states that as early a date should be fixed for the argument of this case as is consistent with the convenience of the Court and a reasonable opportunity to counsel for both litigants to prepare their briefs. It is of great importance to all of the states, who are parties to this litigation, that their rights should be finally established at the earliest practicable date. It is of especial importance to the Sanitary District, for, on the faith of the permit of the Secretary of War, the validity of which is challenged in these proceedings, the Sanitary District has made, and is still making, large expenditures of money to comply with the conditions of said permit, and it is, therefore, of great practical importance to the Sanitary District that the validity of this permit be established as soon as possible.

The Sanitary District therefore asks the Court at this time to enter an order as to the time for filing briefs and a date for the oral argument of such exceptions.

As the only exceptions filed are those of the complaining states, they are in the position of appellants, and the respondents, of appellees, and it is therefore submitted that this Court, in fixing the time for the filing of briefs, should first require the complaining states to file their briefs and that a reasonable opportunity should then be given to the respondents to file reply briefs.

Such an order will probably serve the convenience of the Court, for the reason that, if the respondents were obliged to file their briefs at the same time that the complaining states file their briefs, it would be necessary for the respondents in their brief to discuss all of the exceptions which are filed by the complaining states. The State of Missouri, alone, has filed thirty-nine exceptions and the consideration of all the complainants will

therefore, be great in number and varied in character. If counsel for the respondents can first examine the briefs of complainants before filing their answering briefs, they will know more clearly the exceptions upon which the complaining states chiefly rely and can then adapt their briefs to the nature of the objections and thus avoid an unduly extended brief in reply.

Counsel for respondents suggest for the consideration of the Court that thirty days be allowed, from January 3rd, to the complainants to file their briefs, and that an equal time be then allowed counsel for the respondents to file their answering briefs and that the date of the oral argument shall, therefore, be fixed, if convenient to the Court, as soon after the sixty-day period as practicable.

For the urgent public reasons above stated, it is earnestly hoped by the respondents that a date may be fixed for the oral argument that will permit of a final disposition of the case before the Court recesses for the summer, if the convenience of the Court makes this practicable.

All of which is respectfully submitted.

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